Supreme Court, U.S.
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NO.

In The

# Supreme Court of the United States

October Term, 1998

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Nelson Fernandes,

Petitioner,

v.

EPA, Administrator of the EPA,
Regional Administrator for Region II,
Commissioner of NJDEP,
Rockaway Township Town Council,
Attorney General of the United States,

Respondents.

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## Petition for Writ of Certiorari

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120 pp

## Questions for Review

1. Did appellate panel violate law of the case, stare decisis, and dismissal without prejudice by affirming res judicata based on the 95 opinion, overlooking the May 1995 affirmed dismissal without prejudice (Exh. F). Did it also err by overlooking orders that show the court relied on its Aug. 95 order for res judicata.

2. Did defendants waive their right to res judicata by not previously appealing the May 1995 order or March 1995 opinion. And does law of the case require the courts to honor the dismissal without prejudice, and limit sanctions to a re-filing of only those claims listed in the affirmed 1995 opinion.

3. Did district court lack jurisdiction to render its Aug. 1995 order, thus causing a manifest injustice by finding res judicata, since the 1997 opinion states it relinquished jurisdiction in the March 1995 opinion on statute of limitations grounds, and by not vacating the May 95 order to regain jurisdiction.

4. Did a constitutionally protected property interest develop in the affirmed dismissal when defendants failed to appeal, and did courts take that interest contrary to law of the case rules. Did panel err by ruling on the 95 opinion, instead of finding court had no power to deviate based on orders appellant provided.

5. Does the record show the courts failed to read the complaint on appellant's equitable tolling allegation, and the allegations against Rockaway. And does the findings on the sanction and statute of limitations represent a denial of due process or gross abuse by failing to read the complaint.

6. Since the complaint alleges equitable tolling, fraudulent concealment, and a continuing violation of federal law, was it a gross abuse of discretion for the appellate court to affirm the bar of limitations without reading, and reviewing the allegations as they apply to these doctrines.

7. Does law of the case bar a district court from modifying the claims listed in the 1995 opinion since they were affirmed. And can appellant rely on that affirmation to raise claims nine and ten since they are not in that opinion, and are based on a different nucleus of facts.

8. If law of the case precludes reexamination of issues decided on appeal, was appellant entitled to file his action because of the affirmed dismissal without prejudice. And does the sanction represent an unconstitutional taking of appellant's property, since the claims it basis the sanction on are different from those in the affirmed 1995 opinion that would constitute res judicata.

9. Since EPA admitted not having explicit CWA authority to impose its grant condition, is EPA in continuing violation of Supreme Court rulings that require explicit statutory authority, and does that conduct support equitable tolling and a continuing violation theory because its grant condition came after those rulings. And did the appellate court deny due process by not deciding this question, because it proves the allegations in the complaint.

10. Did the district court abuse its discretion by not converting the motion to dismiss into one for summary judgment since equitable tolling, fraudulent concealment, and a continuing violation theory are alleged in the complaint. If so, was the court required to consider appellant's motion for summary judgment instead of dismissing it as moot.

11. Was appellant denied due process by affirming res judicata on the 95 opinion because that error kept the panel from reaching facts in the record that were pertinent to the appeal. Facts that prove appellant's action was timely, that the district court had no power to find res judicata or impose a sanction contrary to the affirmed order and opinion, and to avoid appellant's law of the case arguments.

12. If the Aug. 95 order is found to be valid, can it be res judicata against the affirmed dismissal without prejudice, thus allowing a court to find res judicata on an order that it could have vacated before it was appealed. Moreover, would that allow a lesser court to overrule the mandate in the affirmed dismissal, law of the case rules, and appellant's right to file another action in reliance of the affirmed dismissal without prejudice.

13. Did the appellate court have a duty to review the Aug. 95 order for a manifest injustice or lack of jurisdiction as requested by appellant, and was it required to render a finding on that request. Moreover, is that finding also essential to the proceedings since its res judicata affirmation based on the 1995 opinion overlooks the Aug. 95 order in a manner that creates the impression that the district court never relied on that order for res judicata.

14. Was EPA's motion for clarification rendered moot by the district court denial of reconsideration, and its failure to vacate the May 1995 dismissal without prejudice.

15. If the panel didn't err on the issues in this petition, would it have to answer appellant's question of law on EPA's continuing violation of the CWA.

## Parties

The caption includes the names of all the parties.

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| C | 4-6 | Feb. 26, 1998 | **Appellate Opinion** |
| D | 8-26 | Aug. 12, 1997 | **District Court Opinion/Order** |
| | 7 | Oct. 7, 1996 | Denial of Petition for Certiorari |
| E | 27 | May 13, 1996 | Denial of Petition for Rehearing |
| F | 28 | Mar. 26, 1996 | Affirmation of Orders |
| G | 29-31 | Aug. 24, 1995 | Partial summary judgment |
| H | 32-34 | June 19, 1995 | Order on Reargument |
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(A, p.12) – **A** designates the Exhibit letter, **p.** indicates the page on which the statement referred to can be found. The page numbers of the exhibits are sequentially numbered from 1 to the last page of the last exhibit, in order to provide precise locations.

## Basis for Jurisdiction

(i) Feb. 26, 1998 Judgement of the Third Circuit (Exh. B).

Feb. 26, 1998 Appellate Opinion (Exh. C).

Aug. 12, 1997 District court opinion and order (Exh. D)

(ii) Apr. 23, 1998 Denial of Rehearing Petition (Exh. A).

(iv) This Court's jurisdiction is invoked pursuant to 28 U.S.C. δ 1254(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

(v) Petitioner, referred to as ("appellant"), has served a copy of this petition on the Solicitor General of the U.S. pursuant to Rule 29. 4. (a) of this court.

## Constitutional Provisions and Statutes Involved

This case was dismissed on a motion for failure to state a claim. Therefore, the merits were not reached.

## Statement of the Case

Complainant seeks money damages for a civil rights conspiracy, violations of CWA, and a violation of a Title VI regulation. EPA denied appellant a federal benefit by imposing a grant condition not authorized by statute in violation of Supreme Court rulings. This case on multiple claims was dismissed without prejudice on May 11, 1995 (Exh, I). That order was affirmed on review (Exh. F). Appellant filed this action in reliance of the affirmed dismissal without prejudice, only to have it dismissed on res judicata and statute of limitations grounds.

District court dismissed appellant's complaint on 12 issues. Appellant's brief reduced that to three (3) issues, which result from misstated facts in the district court opinion and an appellate error. Two issues stem from the appellate court's failure to read the complaint as the result of prejudicial remarks. The third results from panel erroneously affirming res judicata based on the 1995 opinion, which overlooks the May 11, 1995 dismissal without

prejudice (Exh. I) that was affirmed (Exh. F). Moreover, the district court relied on its Aug. 95 order for res judicata, not the March 95 opinion. Both courts also disregarded appellant's property interest in the affirmed dismissal and took his property by imposing a sanction in violation of law of the case.

Additional pertinent facts are as follows:

1. The panel overlooked the May 1995 order (Exh. F), which incorporates the Mar. 1995 opinion (Exh. J) by necessary implication. Arizona v. Cal., 460 U.S. 605, 609 (1983).

2. Appellate panel errs by affirming res judicata (Exh. C) based on the 1995 opinion (Exh. J). That opinion resulted in the May 11, 1995 order that dismissed appellant's claims without prejudice (Exh. I). That order was affirmed on review (Exh. F). Hence, the 1995 opinion is subject to the law of the case, which the panel overrides by not honoring the decision of last appellate review (Exh. F). Arizona v. Cal., 460 U.S. 605, n.8 (1983), U. S. v. Camou, 184 U.S. 572 (1902).

3. The 1995 opinion reviewed by the appellate court listed the claims from the state case (J, p.39). Since claims nine and ten are not in that list (K, p.56-57), the imposition of the sanction and the panel's affirmation proves it did not read the

complaint. U.S. v. Gaubert, 499 U.S. 315, 327 (1991). Moreover, the district court was barred from modifying affirmed orders. U.S. v. Minicone, 26 F.3d 297, 300 (C.A.2)

4. Both courts finds the statute of limitations has run, which overlooks allegations of equitable tolling, fraudulent concealment and a continuing violation theory in the complaint, further proving they did not read the complaint (K, p.56). U.S. v. Gaubert, 499 U.S. 315, 327 (1991).

5. By sua sponte overriding the law of the case, the appellate panel violated stare decisis. Irwin v. Dept. of V.A., 498 U.S. 89, 100 (1990). (stare decisis demands an attempt to reconcile prior decisions rather than overruling them).

6. The panel also denied appellant his constitutionally protected property interest in the affirmed dismissal without prejudice. Bd. of Regents v. Roth, 408 U.S. 564, 576 (1971); U.S. v. G.M.C., 323 U.S. 373, 378 (1945) (Property rights in a physical thing have been described as the rights "to possess, use and dispose of it."); Emsheimer v. City of New Orleans, 186 U.S. 33, 48 (1902) (dismissed without prejudice, these claims, 'since acquired and now held and owned by' complainant).

7. Appellate panel finds appellant is re-filing an APA claim, though money claims are not subject to review under the APA. Bowen v. Mass., 487 U.S. 879, 892 (1988).

8. The panel's error results in its avoiding facts in the 1997 opinion/order, which shows the district court lacked jurisdiction to render its Aug. 1995 order. The district court relied on the Aug. 95 order in support of res judicata, though it has no power to deviate from the mandated issues (Exh. D, p. 13-14). Briggs v. Pa. R. Co., 334 U.S. 304, 306 (1948); Casey v. Plan. Parenthood, 14 F.3d 848, 856 (3rd Cir. 1994).

9. Failure to read the complaint keeps the courts from having to recognize the allegations against Rockaway in this case are linked to EPA's violations, proving appellant was not aware of EPA's violations during the state case in late 1993. So, late discovery of EPA's violations makes appellant's complaint C.A. 94-338 filed on Jan. 24, 1994 timely against EPA.

10. Appellant's current complaint is subject to equitable tolling because appellant actively pursued his judicial remedies. Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 95-6 (1990) (Equitable tolling applies against government, and treats new complaint as timely, if the former is filed before limitations runs).

11. EPA admitted to the 4 th. Circuit that it did not have explicit authority for its grant condition. Shanty Town Assoc. Ltd. v. E.P.A., 843 F.2d 782, 789 (4th Cir.1988) (This case was argued in a motion for summary judgment and in appellant's question of law to the Third Circuit).

12. EPA involved the NJDEP, RVRSA, and Rockaway to fraudulently conceal the fact that it knew it did not have explicit statutory authority and that it was violating Supreme Court rulings when it imposed its grant condition in 1983. Pennhurst St. S&H v. Halderman, 451 U.S. 1, 17 (1981); Univ. of Texas v. Camenisch, 451 U.S. 390, 399 (1981).

13. In support of fraudulent concealment, exhibit B (p. 76) to complaint, item 6. - Strategy and Timetable, shows EPA conspired with NJDEP to have them deny grant waivers. Appellant could not be aware of this conspiracy until EPA filed this exhibit in the former federal case.

14. EPA concealed the fact that it conspired with the NJDEP to deny appellant's class due process and equal treatment since it lacked statutory authority. Bailey v. Glover, 88 U.S. 342, 349-50 (1875); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992).

15. Exh. A to comp. (p.67) shows EPA knew its grant condition prevents building a septic system, thus denying all practical use of wetland lots in furtherance of its illegal conduct.

16. NJDEP recommended denial of appellant's waiver request (Exh. E to comp.) after appellant received an exemption from the N.J. Wetlands Act (Exh. D to comp.), proving it acted without jurisdiction in support of EPA's conspiracy.

17. Exh. C to complaint adopts Region II actions as policy, making Administrator responsible for the region II conspiracy, and the illegal grant condition.

18. Denial of reconsideration (Exh. H) found no error to justify a rehearing, thus declining jurisdiction to grant partial summary judgement in Aug. 1995.

19. Aug. 24, 1995 order repeats the dismissal without prejudice proving there was no intent to amend the May order to regain jurisdiction for partial summary judgment (G, p.30).

20. EPA's 1995 motion for partial summary judgment was moot since APA review was time barred (D, p.13).

21. Panel was given all the orders, which should have resulted in the review of the overlooked affirmed dismissal without prejudice, and appellant's law of the case arguments.

## ARGUMENT I

### Appellate Court Erred on Res Judicata

Res judicata gives dispositive affect to a prior judgment. Bd. of Tr. v. Centra, 983 F. 2d 495, 504 (3rd Cir.1992). Whereas, a dismissal without prejudice allows a plaintiff to file another action Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Ricketts v. Adamson, 483 U.S. 1 (1987). Hence, the appellate court erred as a matter of law by affirming res judicata based on the Mar. 1995 opinion (C, p.4-5) since that opinion resulted in the overlooked May 11, 1995 order that dismissed appellant's claims without prejudice (Exh. I & D). That order was affirmed, which requires the panel to honor the decision of that court (Exh. F). Arizona v. Cal., 460 U.S. 605, n.8 (1983).

The orders show the district court based res judicata on its Aug. 95 order (Exh. G), not its 1995 opinion. By deliberately erring on the 1995 opinion, the panel avoids having to find the district court had no power or authority to deviate from the mandated dismissal without prejudice and listed former claims (Exh. F). Briggs v. Pa. R. Co., 334 U.S. 304, 306 (1948); Casey v. Plan. Parenthood, 14 F.3d 848, 856 (3rd Cir. 1994). So, the foregoing conduct denied appellant due process in three ways.

## ARGUMENT II

### Gross Abuse by Both Courts on Law of the Case

Appellant's brief argued law of the case and that the Aug. 24, 1995 order constituted a manifest injustice. Appellant asked that EPA be denied the benefit of that order. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 245 (1943). The appellate court ended by sua sponte overruling law of the case and stare decisis.

### Appellate Court Overrides Law of the Case

The panel finds, **"Fernandes has litigated the 1989 denial of his application for a waiver, as shown in the 1995 opinion of the district court. He lost on the merits, and cannot continue to challenge this occurrence by adding new parties and refiling the action."** The panel errs since the 1995 opinion resulted in a dismissal without prejudice (Exh. I), making that order law of the case when it was affirmed (Exh. F). Ariz. v. Calif., 460 U.S. 605, 618 (1983)(a decided rule of law should continue to govern the same issue in the same case). And, in a closely related case. Casey v. Planned Parenthood, 14 F.3d 848, 856 n.11 (3rd Cir.1994). The doctrine prevents relitigation of settled issues in a case, thus protecting the settled expectations of

parties, ensuring uniformity of decisions, and promoting judicial efficiency. Montana v. U.S., 440 U.S. 147, 153-4 (1979). The panel sua sponte affirmed res judicata based on the Mar. 95 opinion, which overlooks the affirmed May 95 order. Except, an appellate court can only reconsider a previously decided issue if substantially different evidence is introduced or the decision is clearly erroneous and works a manifest injustice. Arizona v. California, 460 U.S. 605, n.8 (1983) Neglecting an order violates the fundamental purpose of the law of the case. Liddell v. Missouri, 731 F.2d 1294, 1305 (8th.Cir.1983). The panel neglected orders, which avoided its duty to sua sponte recognize when a district court lacks jurisdiction. Mitchell v. Maurer, 293 U.S. 237, 244 (1934). *See* Juidice v. Vail , 430 U.S. 327, 331-332 (1977).

**Order in Support of Res Judicata Should Have Been Vacated**

In its review of the March 27, 1995 oral opinion, the current opinion states (D, p.13), **"It also found the challenge to the EPA grant condition time-barred by a six year statute of limitations imposed by the APA."** The district court then states (D, p.14), **"By Letter Order dated August 24, 1995, the Court granted summary judgment in favor of the United States, finding that**

**the EPA had not acted arbitrarily and capriciously when it denied Fernandes's waiver request."** The opinion omits the word **"partial"**, and fails to mention its Aug. order was based on APA 5 U.S.C. 706(2)(A) (G, p.30-31). So, the APA bar that resulted in the dismissal without prejudice bars the Aug. 24, 1995 order. Hence, the panel's erroneous ruling on the 95 opinion kept it from reaching the fact that the district court lacked jurisdiction to render its Aug. 95 order, thus breaching that duty, denying due process, and violating stare decisis. Irwin v. Dept. of V.A., 498 U.S. 89, 100 (1990) (stare decisis demands an attempt to reconcile prior decisions rather than overruling them).

The Aug. 95 order constituted a manifest injustice since the May order was never vacated to regain jurisdiction. U.S. v. Stanley, 483 U.S. 669, 674 (1987). So, the court clearly lacked jurisdiction to grant partial summary judgment on Aug. 24, 1995 (G, p.31). Waley v. Johnston, 316 U.S. 101, 104-5 (1942); Piedmont & N. Ry. Co. v. U.S., 280 U.S. 469, 476 (1930)(res judicata does not apply when the court lacked jurisdiction). The August order also reaffirms the dismissal without prejudice proving no change was intended (G, p.30). In its denial of reconsideration, the court also reaffirmed the dismissal without

prejudice, and expressly rejected jurisdiction since no error was found (H. p.33). So, EPA's motion for clarification was moot. Even if the Aug. order were valid it would bar another APA claim, not the damage claims that were affirmed. Arizona v. California, 460 U.S. 605, n.7 (1983) ("A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

The foregoing supports the inference that the court rendered its Aug. 95 order without jurisdiction, so it could dismiss this action on res judicata grounds. Misstated facts in the 97 opinion, and a sanction for claims not listed in the 95 opinion, supports this inference. This conduct is a gross abuse of discretion that requires reversal. U.S. v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973); U.S. v. Lehigh Val R Co., 220 U.S. 257, 271 (1911).

**Panel Acted Arbirarily to Avoid Law of the Case Arguments**

The panel realized it could not affirm res judicata based on the Aug. 95 order, since the court lacked jurisdiction by not vacating the May 95 order. U.S. v. Stanley, 483 U.S. 669, 674 (1987). It also realized, defendants did not appeal the May 95 order or the March 95 opinion, thus waiving their right to challenge either in

this case. Montana v. U.S., 440 U.S. 147, 153-4 (1979); Bridge v. U.S. Parole Com'n, 981 F.2d 97, 102 (3rd Cir.1992); Griffin v. Mich. Dept. of Correct., 5 F.3d 186, 190 (6th.Cir.); Little Earth of United Tribes v. Dept. of Housing, 807 F.2d 1433, 1441 (8th.Cir.1986). So it avoided; these facts, the affirmed May 95 order, and appellant's law of the case arguments by arbitrarily affirming res judicata based on the March 1995 opinion.

The record shows that the May 95 order (Exh. I)) dismissed appellant's claims without prejudice. Appellant relied on that order as providing him with the right to file another action. Cooter & Gell v. Hartmax Corp., 110 S.Ct. 2447, 2456, 2460 (1990); Ricketts v. Adamson, 483 U.S. 1 (1987); California v. Texas, 437 U.S. 601 (1978). The May 95 order was affirmed by the appellate court (F, p.28), making it law of the case. Arizona v. California, 460 U.S. 605, 618 (1983) (Dictum); Davis v. O'Hara, 266 U.S. 314 (1924). That affirmation bars the district court from now reconsidering the dismissal without prejudice, and from amending the list of claims subject to res judicata. U.S. v. Minicone, 26 F.3d 297, 300 (C.A.2); Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1150 (C.A.5 1993). It also bars the appellate court from reconsidering its prior ruling, because no new evidence,

intervening change in law, or error was brought to the panel's attention. *Id.* @ 300; *id.* @ 1150. It limits the court to "**issues not expressly or implicitly disposed of by the appellate decision.**" Casey v. Planned Parenthood, 14 F.3d 848, 856 (3rd Cir.1994) (court had no power to deviate from appellate mandate).

The panel avoided the law of the case arguments by making it appear that the March 95 opinion ended the case, and that district court's res judicata ruling was based on that opinion, which arbitrarily disregards the orders presented by appellant in his brief. Moreover, the panel cited no facts or authority that would suggest it was correcting any error, it simply misstates facts to create a false impression. This conduct overrules law of the case, and stare decisis. Irwin v. Dept. of V.A., 498 U.S. 89, 100 (1990). Disregarding the affirmed May 95 order also overrules the Supreme Court case cited on a dismissal without prejudice, which grants the right to file a new action. The panel's conduct denied appellant due process, and his constitutionally protected property interest in the dismissal without prejudice that was affirmed on appeal, which remains uncontested and unchanged (Exh. F). Bd. of Regents v. Roth, 408 U.S. 564, 576 (1971); U.S. v. G.M.C., 323 U.S. 373, 378 (1945).

**District Court Violated Law of the Case**

In the 95 opinion reviewed by the panel (J, p.39), the district court listed the claims from the state action that would constitute res judicata; (1) Selling property in violation of N.J.S.A. 40:A12-13, (2) Policy and custom to sell worthless lots in violation of 42 USC 1983, (3) Township Engineer conspired with Council to sell worthless lots, (4) Council conspired to sell worthless lots, (5) Conspiracy to conceal grant condition, (6) Denying requests to conceal conspiracy to sell worthless lots, (7) Engineer harassed plaintiff, (8) Engineer discriminated upon plaintiff; (9) Fraud by selling lots "as is."

Law of the case bars a court from **"reconsidering or modifying any of its prior decisions that have been ruled on by the court of appeals,"** U.S. v. Uccio, 940 F.2d 753, 757 (2d Cir.1991). Despite this rule, the district court found claims nine and ten against Rockaway barred by res judicata, though unrelated to the claims outlined in the 1995 opinion (J, p.39). This violates the common-law precept that an issue once determined by a competent court is conclusive. Arizona v. Cal., 460 U.S. 605, 619 (1983) This arbitrary conduct by the district court is consistent with its rendering the Aug. 95 order without jurisdiction.

## ARGUMENT III

### Neither Court Read the Complaint

Appellant was denied due process because the appellate court did not read the complaint or accept its allegations as true. So, its affirmation is reversible gross abuse of discretion. U.S. v. Lehigh Val R Co., 220 U.S. 257 (1911).

When a motion to dismiss is based on the statute of limitations bar "[t]he question to be answered thus becomes whether the assertions of the complaint, given the required broad sweep would permit adduction of proofs that would provide a recognized legal basis for avoiding the statutory bar." Leone v. Aetna Cas. & Surety Co., 599 F.2d 566, 567 (3rd Cir.1979). The panel is required to accept facts alleged in the complaint and attached exhibits, as true. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855 (C.A.3 1994); U.S. v. Gaubert, 499 U.S. 315, 327 (1991). Allegations of pro se complaint are held to a less stringent standard. Conly v. Gibson, 355 U.S. 41, 45-46 (1957).

### District Court Misleads the Panel

The district court creates the impression that it read the allegations against Rockaway, as follows; (D, p.23), "**No matter**

**how plaintiff restates or restyles his bases for relief, the issues and the claims are based upon the same facts and have been resolved against him."** This statement prejudiced the panel, causing it to treat the matter summarily, instead of reading and accepting the allegations in the complaint as true.

Had the panel not overlooked the affirmed dismissal without prejudice, and had it read appellant's allegation of equitable tolling, it would have answered appellant's question of law, proving EPA to be in continuing violation of law. U.S., Etc. v. Comm. Science Tech., 574 F.2d 1292, 1296 (1978).

**The Panel Erred Several Ways by Affirming the Sanction**

Appellant alleged (K, p.56-57); **"CLAIM NINE - Rockaway Township's Ordinance 54-lOOL Denied a Federal Benefit."** and **"CLAIM TEN - Rockaway Township Illegally Charged an Assessment."** The appellate court found (C, p.5); **"He litigated the merits of his 1985 purchase of the plot of land in New Jersey state court. As the 1993 opinion of the New Jersey Appellate Division shows, Fernandes has actually litigated his claims on the merits in the state courts. He cannot sue once more concerning this same transaction or**

**occurrence."** Since a challenge to an ordinance and illegal assessment has nothing to do with the 1985 purchase, or any issue in the 1995 opinion, proves the panel affirmed the sanction without reading the complaint, in reliance of the court's misleading statement, thus breaching its duty. Since appellant's allegations are based on a different nucleus of facts, the sanction must be rescinded as inconsistent with the panel's basis for affirmation, which were claims related to the 1985 purchase.

By failing to read the complaint, there is no way the panel could determine if the district court abused its discretion or not. Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 615 (3d Cir. 1991). Instead, the panel accepted the court's conclusions at face value, which proves both courts failed to read the complaint in order to determine if appellant's allegations actually constituted res judicata. *Id* @ 614. Moreover, the courts violate law of the case by arbitrarily finding res judicata on issues not in the 95 opinion. So, both courts are guilty of a gross error amounting to a denial of due process that deprives both courts of jurisdiction to render and affirm this judgment. Burns v. Wilson, 346 U.S. 844 (1953). So, the sanction takes appellant's property in violation of due process. U.S. v. G.M.C., 323 U.S. 373, 378 (1945).

The sanction was imposed to avoid finding the allegations against Rockaway flowed from EPA's misconduct, not the claims in the 95 opinion, proving appellant was unaware of his claims against the EPA during the state case. Moreover, the sanction avoids a thorough review of the Aug. 12, 1997 opinion (D, p.12), which contains facts proving appellant's complaint was timely based on late discovery. That opinion states, the district court found appellant's petition for certification to the N.J. Supreme Court was denied on May 13, 1993. The Supreme Court denied Certiorari on Oct. 4, 1993, and appellant filed his complaint on Jan. 24, 1994, which makes it timely based on belated discovery, since appellant alleged "**equitable tolling, fraudulent concealment and continuing violation**." Bailey v. Glover, 88 U.S. 342, 349-50 (1875).

**Denial of Due Process on Statute of Limitations**

The appellate panel's failure to read the complaint is further evinced by its failure to determine if allegations of any tolling doctrines existed and could be supported in the complaint. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

The appellate court erred by not reading the allegation (K, p.56); **"The statute of limitations is not a bar to this action . . the doctrines of estoppel, equitable tolling, fraudulent concealment and continuing violation also apply to all the defendants."** This allegation appears in the complaint, so EPA's statute of limitations defense never appeared on the face of the complaint. Hanna v. U.S.V.A. Hosp., 514 F.2d 1092, 1094 (3d.Cir.1975). The district court deliberately abused its discretion by avoiding this allegation so it didn't have to convert EPA's motion into one for summary judgment, which would require consideration of appellant's motion for summary judgment, instead of dismissing it as moot (D, p.26). Robinson & Dalton, 107 F.3d 1018, 1022 (3d.Cir.1997). The court's refusal to consider appellant's motion for summary judgment resulted in his including the pertinent facts in a question of law that was presented to the appellate court.

Since appellant's former complaint was timely based on late discovery, equitable tolling requires the current complaint be treated as timely. Irwin v. Dept. of Veteran Affairs, 498 U.S. 89, 95-96 (1990). The facts are in the record, but were overlooked as a result of the error on the sanction.

## ARGUMENT IV

**Denying Due Process by Avoiding a Question of Law**

The appellate panel erred as a matter of fact and law by finding res judicata on the same opinion that resulted in the affirmed dismissal without prejudice, and by finding the statute of limitations had run by not reading appellant's equitable tolling allegation. The panel acted arbitrarily to avoid appellant's question of law. Maryland Cas. Co. v. Jones, 279 U.S. 792, 796 (1929) (question of law is reviewable, like a motion by plaintiff).

Both courts used judicial tactics to avoid a motion for summary judgment and a question of law supported by the fact that EPA's grant condition continues to violate the CWA since Feb. 9, 1984 when RVRSA accepted that condition. Brenner v. Local 514, 927 F.2d 1283, 1295 (3rd Cir.1991)(continuing violation is accepted federal doctrine). Claim Six, alleges Supreme Court and third circuit required explicit authority, and Claim Eight alleges a violation of CWA (K, p.52-53). EPA's grant condition was imposed three years after rulings that prohibit EPA's grant condition. Pennhurst St. S&H v. Halderman, 451 U.S. 1, 17 (1981); Univ. of Texas v. Camenisch, 451 U.S. 390, 399 (1981); St. of NJ Dept. of Ed. V. Hustedler, 662 F.2d 208,

214 (3rd Cir.1981) ("terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant.").

**"EPA concedes that the FWPCA does not give it authority to regulate sewer service directly."** Shanty Town Assoc. Ltd. v. E.P.A., 843 F.2d 782, 789 (4th Cir.1988). By admitting it lacked explicit statutory authority after it imposed its grant condition disposes of any fact that would bar consideration of a pure question of law. Moreover, the Administrator of the EPA excluded residential properties from regulations on polluting public treatment works 40 CFR § 403.1. Nat. Ass'n. of Metal Fin. v. E.P.A., 719 F.2d 624, 638 (3d.Cir.1983) (Conduct admitting a lack of authority over residential properties prior to imposing the grant condition, proving a deliberate and continuing violation of the CWA and owner's property rights).

EPA's grant condition amount to a **"violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation of a right that is clearly set forth in the text of the statute."** Golden Gate Tr. Corp. v. L.A., 493 U.S. 103, 112 (1989).

## ARGUMENT V

### Conduct That Shocks the Conscience

The facts clearly show that the appellate court did not read appellant's complaint though the standards of review require it be read. This supports the inference of a policy that precludes reading the primary document to a review of a dismissal for failure to state a claim, or it proves the panel was prejudiced by the district court's misleading statement that these were the same claims that it formerly dismissed.

Furthermore, the appellate court affirmed res judicata based on the 95 opinion, which violates the law of the case by disregarding the May 95 order (Exh I) and the Appellate affirmation of that order (Exh. F), which appellant provided. The panel acted arbitrarily so it could avoid the record, two law of the case arguments, and a question of law. Moreover, the panel fails to cite one fact or authority that would even remotely suggest that it was correcting some error by the former appellate court, thus proving it overlooked these orders. Consequently, the arbitrary affirmation of res judicata denied appellant due process.

There is a third and equally important issue to be considered by this Court. That is the issue of a district court avoiding a

summary judgment motion by "abusing its discretion" with misstated findings, misleading facts, and unsupportable sanction. Not to mention its failure to convert the motion to dismiss into one for summary judgment by deliberately avoiding appellant's allegation of equitable tolling.

The policies of both courts have denied appellant due process. Moreover, it encourages further violations by EPA because it now thinks the courts are incompetent, or support agency violations in order to conceal EPA's misconduct from the public. It further appears that the courts have no compunction about leaving the public injured by illegal agency conduct, and by imposing sanctions to deprive the public of even more property as an oppressive act, and to punish appellant for attempting to correct the misconduct of the EPA and Rockaway. The foregoing clearly constitutes conduct that shocks the conscience. U.S. v. Salerno, 481 U.S. 739, 746 (1987).

## ARGUMENT VI

**Denying Rehearing Constitutes a Denial of Due Process**

The Appellate Court's denial of appellant's petition for rehearing is a refusal to comply with FRAP 40, which amounts to a denial of due process. Appellant filed a petition for rehearing in conformance with that section of FRAP 40 that states; **"The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . ."**

Appellant's petition for rehearing, stated; **"Appellant's complaint alleged; fraudulent concealment, equitable tolling, waiver and a continuing violation."** On the issue of the sanction, appellant included copies of the overlooked documents in the petition, and stated; **"The panel overlooked these exhibits, which proves its affirmation** [of the sanction] **is wrong and unjust."** Denying a petition to refuse to reconsider factual errors is to state these facts are not in the record, which is not true. Pioneer Invest. Svs. v. Brunswick Assoc. Ltd., 507 U.S. 380 (1993) (Supreme Court is not obligated to accept findings when they are not supported by the record).

## CONCLUSIONS

Appellant filed a complaint to address the violations of the EPA, only to be denied due process by the courts. This petition clearly shows both courts erred in ways that supports the inference of deliberate gross abuses aimed at disposing of a pro se litigant, or possibly any litigant because of a predisposed inclination toward federal agencies, regardless of their actions, which proves a gross abuse by way of oppression.

When a district and appellate court willingly abuses their discretion with judicial trickery, it reflects on this Court as the supervisor of the lesser courts. It conveys the impression that the law is what the courts will allow it to be by judicial trickery to avoid facts and circumvents legal arguments, instead of based on a forthright assessment of the facts and the law.

Appellant filed this petition in order to correct these abuses, and to determine if the courts are truly governed by law or merely the perception of law created by artifice. I truly pray that you will vindicate my belief that the conduct to this point is not is indicative of the conduct to be expected in this Court, or accepted by this Court, when it involves agency violations.

## Table of Exhibits


| Exh. | Page | Date | Subject |
|---|---|---|---|
| A | 1 | Apr. 23, 1998 | Denial of Petition for Rehearing |
| B | 2-3 | Feb. 26, 1998 | Appellate Court Judgment |
| C | 4-6 | Feb. 26, 1998 | Appellate Opinion |
| D | 8-26 | Aug. 12, 1997 | District Court Opinion/Order |
| | 7 | Oct. , 1996 | Denial of Petition for Certiorari |
| E | 27 | May 13, 1996 | Denial of Petition for Rehearing |
| F | 28 | Mar. 26, 1996 | Affirmation of Orders |
| G | 29-31 | Aug. 24, 1995 | Order "partial summ. judgment" |
| H | 32-34 | June 19, 1995 | Order on Reargument |
| I | 35-36 | May 11, 1995 | Order dismissing without prej. |
| J | 37-43 | Mar. 27, 1995 | District Court opinion |


**Complaint and Attached Exhibits**


| | | | |
|---|---|---|---|
| K | 44-64 | Feb. 27, 1997 | Amended Complaint |
| a | 65-69 | Apr. 23, 1979 | EPA document |
| b | 70-76 | May 25, 1979 | EPA document |
| c | 77-78 | July 11, 1980 | EPA document |
| d | 79-81 | Oct. 21, 1988 | Wet.exemption |
| e | 82-83 | Apr. 1, 1989 | Recom. Denial |
| f | 84-85 | May 5, 1989 | EPA letter |

**EXH. - A April 23, 1998 Denial of Petition for Rehearing**

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5579

NELSON FERNANDES, Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL, Appellee
(D.C. Civ. No. 96-cv-05791)

**Present:** BECKER, Chief Judge, SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, McKEE, RENDELL and GARTH,* Circuit Judges,

**SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC**

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

"s/BECKer"
Chief Circuit Judge

DATED: APR 23, 1998

**EXH. - B Feb. 26, 1998 Appellate Court Judgment**

IN THE UNITED STATES COURT OF APPEALS

NO. 97-5579

NELSON FERNANDES, Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-O5791)
District Judge: Honorable William H. Walls

Submitted Under Third Circuit LAR 34.1(a)
February 13, 1998
Before: BECKER, Chief Judge, ALITO and GARTH,
Circuit Judges.

(Filed Feb. 26 1998)

**JUDGMENT**

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on February 13, 1998. On consideration whereof it is now here

ORDERED AND ADJUDGED by this court that the order of the district court of August 12, 1997 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

"s/P. Douglas Sisk"

Clerk

DATED: Feb. 26, 1998

**EXH. - C Feb. 26, 1998 Appellate Opinion**

NOT-FOR-PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5579

NELSON FERNANDES,
Appellant

V.

EPA; ADMINISTRATOR OF THE EPA;
REGIONAL ADMINISTRATOR FOR REGION II;
COMMISSIONER OF NJDEP; ROCKAWAY TOWNSHIP
COUNCIL; ATTORNEY GENERAL

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 96-cv-05791)
District Judge: Honorable William H. Walls

Submitted Under Third Circuit LAR 34.1(a)
February 13, 1998
Before: BECKER, Chief Judge, ALITO and GARTH,
Circuit Judges.

(Filed Feb. 26, 1998)

MEMORANDUM OPINION

BECKER, Chief Circuit Judge.

The order of the district court will be affirmed. As to the merits of Fernandes' claim, his claims are barred by res judicata.

**He litigated the merits of his 1985 purchase of the plot of land in New Jersey state court. As the 1993 opinion of the New Jersey Appellate Division shows, Fernandes has actually litigated his claims on the merits in the state courts. He cannot sue once more concerning this same transaction or occurrence.** See, e.g., Board of Trustees V. Centra, Inc., **983 F.2d 495, 504 (3d Cir. 1992).** Similarly, **Fernandes has litigated the 1989 denial of his application for a waiver, as shown in the 1995 opinion of the district court. He lost on the merits, and cannot continue to challenge this occurrence by adding new parties and refiling the action.** Id. **Further, Fernandes has filed this action in 1997, between 8 and 12 years after the relevant events. His actions are barred by the applicable statutes of limitations.**

As to the district court's Rule 11 sanctions, we review for abuse of discretion. Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 615 (3d Cir. 1991). However, this standard may incorporate other standards of review, for the Supreme Court has indicated that a district court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell

v. Harrmarx Corp., 496 U.S. 384, 405 (1990). Given the facts of this case, the district court's sanctions are not an abuse of discretion. Fernandes has been pursuing claims against Rockaway for almost a full decade. He has appealed the clearly merited dismissals of his claims all the way to the United States Supreme Court twice, and yet still has come back for more. The district court did not abuse its discretion in forcing Fernandes to pay a modest amount of attorney's fees, and in enjoinnig him from bringing even more suits arising from these same events. The order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion of the court.

BY THE COURT:
"S/ Becker"
Chief Circuit Judge

The Supreme Court denied a petition for Certiorari on October 7, 1996 that appellant was unable to find in order to present it in this spot.

EXH. – D August 12, 1997 District Court Opinion & Order

UNITED STATES DISTRICT COURT

District of New Jersey

Chambers of
William H. walls
District Judge

Martin Luther King Jr.
50 Walnut Street
Newark, New Jersey 07101

(201) 645-2564
(201) 645-6467 Fax

NOT FOR PUBLICATION

LETTER ORDER
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Plaintiff pro se

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Attorney for Defendant Rockaway
Township Town Council

Re: Fernandes V. EPA, et als. Civil No. 96-5791

Dear Counsel and Litigant:

For the fourth time in seven years, plaintiff Nelson Fernandes ("Fernandes") has brought suit against various parties for the 1989 denial of permission to connect his property in Rockaway Township to the township sewer line. Defendants United States Environmental Protection Agency (the "EPA"), Administrator of the EPA, Administrator of Region II of the EPA, and the Attorney General of the United States (collectively, "the federal defendants") move for dismissal of the Complaint. Defendant Rockaway Township Town Council ("Rockaway") moves for dismissal of the Complaint and also for sanctions against Fernandes under Rule 11 of the Federal Rules of Civil Procedure. Fernandes cross moves for summary judgment. Pursuant to Rule 78 of the Federal Rules of Civil Procedure, the Court decides this matter on the basis of the written submissions of the parties.

Factual Background

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as to the

Rockaway as to the condition, area, or boundaries of the property herein relevant."

Lot 8 was one of the land parcels on which the public bid. A portion of Lot 8 was covered by environmentally sensitive freshwater wetlands. On September 21, 1985, plaintiff won ownership of Lot 8 by bidding $10,000.00. Plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to Lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased Lot 9, which is adjacent to Lot 8, at a tax sale. He planned to subdivide the two lots and build a single family dwelling and hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

The Rockaway valley Regional Sewer Authority ("RVRSA") operates a sewer system in Morris County, New Jersey. In 1983, the federal government gave RVRSA a grant to fund in part a sanitary sewer system. According to Grant Agreement No. C340389- 04-02, lots within an environmentally sensitive area (such as wetlands) cannot be connected to federally funded sewers without a written waiver from the EPA Regional Administrator. The purpose of the condition is to protect the surrounding wetlands.

**Plaintiff's lots are two of approximately 140 lots in the Township which were impacted by the EPA grant condition.**

In 1989, at Fernandes' request, the RVRSA submitted a waiver application to the EPA for Lot 8. The Army Corps of Engineers and the NJDEP determined that Lot 8 contained wetlands areas. After reviewing the application, defendant New Jersey Department of Environmental Protection ("NJDEP") recommended that the waiver be denied and forwarded the application and recommendation to the EPA. On May 5, 1989, after reviewing the application and NJDEP's recommendation, the EPA denied Fernandes' request for a waiver.

Procedural Background

On July 19, 1990, Fernandes filed an Amended Complaint in the United States District Court for the District of New Jersey against Rockaway Township Town Council and the Township Engineer alleging that he was fraudulently induced into purchasing the two lots without Rockaway disclosing a sewer use ban imposed on those properties because of the EPA grant condition. Fernandes v. Rockaway Township Town Council, Civ. No. 90-0830 (MTB). On November 28, 1990, the Hon. Maryanne Trump Barry, U.S.D.J., dismissed the case without prejudice for failure to state a claim for violation of any constitutional right.

On December 4, 1990, Fernandes filed another action against the same defendants in the Superior Court of New Jersey, Law Division, Morris County. Fernandes v. Rockaway Township Town Council, Docket No. MRS-L-5845-90. On July 10, 1991, the court dismissed all but two counts of the complaint; the

remaining two were dismissed on January 3, 1992. On January 22, 1993, the Appellate Division affirmed the dismissal of Fernandes' state court complaint, and **on March 15, 1993, the New Jersey Supreme Court denied Fernandes' petition for certification. Fernandes' motion for reconsideration from the state supreme court was denied on May 11, 1993, and on October 4, 1993, the United States Supreme Court denied plaintiff's petition for a writ of certiorari.**

Undaunted, Fernandes brought another suit in federal court **on January 24, 1994, which was assigned to the undersigned. Fernandes v. Rockaway Township et al., Civ. No. 94-338 (WHW).** He asserted claims against the EPA, the Regional Administrator, Rockaway Township Town Council and Township Engineer, RVRSA, RVRSA[1]s Executive Director, the law firm of Dorsey & Bell, and John Dorsey and Joseph Bell, individually. The 1994 complaint, as amended, alleged a conspiracy and other wrongdoing by all defendants relating to the 1984 EPA grant condition imposed pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 et seq. **The complaint set forth thirty-nine claims in all, including federal civil rights claims, contract claims, takings claims, and challenges to agency action under the Administrative Procedure Act ("APA") , 5 U.S.C. §§ 701 et seq.**

The federal defendants moved for dismissal of the Complaint on the basis of the doctrine of sovereign immunity,

failure to state a claim upon which relief could be granted, lack of subject matter jurisdiction, and failure to comply with the statute of limitations. The Rockaway defendants, including Dorsey & Bell, John Dorsey, and Joseph Bell, moved for dismissal on res judicata grounds, citing the state court suit which concluded in their favor.

The Court heard oral argument on March 27, 1995 and ruled that Fernandes' claims against Rockaway Township, the Town Council and Township Engineer were barred by res judicata by virtue of the previous state court action against those parties. The Court further ruled that the claims against Dorsey & Bell and John Dorsey and Joseph Bell were also precluded by res judicata, "identical issues hav[ing] been decided on prior adjudication."

**With regard to the federal defendants, the Court noted that sovereign immunity barred the claims.** The Court refused to find a waiver under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346 (b), 2671-2680 because Fernandes had not complied with the administrative claim requirement. **It also found the challenge to the EPA grant condition time-barred by a six year statute of limitations imposed by the APA.**

On May 11, 1995, this Court dismissed all of plaintiff's claims against Rockaway, Rockaway's Township Engineer, the law firm of Dorsey & Bell, John Dorsey and Joseph Bell, individually, RVRSA, and RVRSA's Executive Director,

**dismissed without prejudice all of plaintiff's claims against the EPA and the Regional Administrator of Region II and denied plaintiff's motion for partial summary judgment.** On June 20, 1995, the court denied Fernandes's motion for reargument. **By Letter Order dated August 24, 1995, the Court granted summary judgment in favor of the United States, finding that the EPA had not acted arbitrarily and capriciously when it denied Fernandes's waiver request.**

Fernandes appealed the Court's rulings to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the three orders by Judgment Order dated March 26, 1996. The United States Supreme Court denied certiorari on October 7, 1996.

Not to be discouraged by this turn of events, on February 24, 1997, Fernandes filed the instant Complaint against Rockaway, the EPA, the Regional Administrator, the Attorney General of the United States, the EPA Administrator and the Commissioner of the NJDEP. In his Amended Complaint, Fernandes sets out twelve claims for relief arising from the denial of the waiver, including denial of due process and equal treatment; conspiracy by the EPA and NJDEP in violation of 42 U.S.C. §§ 1983 and 1985; violations of his civil rights pursuant to 42 U.S.C. § 1983; a claim entitled "Third Circuit and Supreme Court Limited EPA's Use of Grant Conditions;" violation of EPA regulations and Title VI; failure to comply with the Clean Water

Act, 33 U.S.C. §§ 1251 et seq.; denial of federal benefits; illegally charging an assessment; failure of the Attorney General to perform her duty, and intentional infliction of emotional distress. Fernandes seeks mandamus, declaration of the parties' rights, and millions of dollars in damages.

Analysis

I. Whether Claims Against the Federal Defendants Should Be Dismissed.

The federal defendants move for dismissal of Fernandes' Complaint on the grounds of res judicata, lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and the applicable statutes of limitations. The Court has considered all the arguments raised by Fernandes in opposition to the motion and finds them to be without merit. Therefore, dismissal is warranted.

The doctrine of res judicata refers to the "distinctive effects of a judgment separately characterized as 'claim preclusion' and issue preclusion.'" 5 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4402, at 6 (1981). Issue preclusion is based upon the notion that "later courts should honor the first actual decision of a matter that

has already been litigated." Burlington Northern R. v. Hyundai Merchant Marine, 63 F.3d 1227, 1231 (3d Cir. 1995). "[0] nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana V. United States, 440 U.S. 147, 153 (1979). Issue preclusion is applied when "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment." Burlington Northern, 63 F.3d at 1232 (citations omitted)

Claim preclusion derives from the principle that "prior judgments may preclude later litigation both as to matters that have actually been litigated and decided and as to matters that have never been litigated or decided." 5 Wright, Miller & Cooper, supra § 4406, at 44. Application of the doctrine requires (1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and a (3) subsequent suit based on the same cause of action. Board of Tr. of Trucking Emp. Pension Fund v. Centra, 983 F.2d 495, 504 (3d Cir. 1992) (citations omitted) . When deciding if claim preclusion bars the second action, a court should consider, among other things, whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions), whether the theory of recovery is the same, and whether

the material facts alleged are the same. United States V. Athlone Indus.. Inc., 746 F.2d 977, 983 (3d Cir. 1984). A later claim may be precluded even if different statutes or theories are cited by the claimant. Id.

The 1994 suit before this Court culminated in a final judgment on the merits. Essentially, Fernandes seeks the same relief as he pursued before this Court in the 1994 complaint -- damages and a voiding of the denial of the waiver. The facts have not changed in the meantime, and the parties remain the same. Even though Fernandes has cobbled together different claims and theories as alleged grounds for relief, this Court has already- held that the EPA's denial of the grant waiver was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. - Such a conclusion necessarily includes a finding that the decision to deny the grant waiver was not illegal and did not violate any prevailing law or regulation.

Among the issues raised by Fernandes on his appeal to the Third Circuit was whether "the EPA grant condition represent[ed] a continuing violation by violating the holdings of Cape May Greene [Inc. V. Warren, 698 F.2d 179 (3d Cir. 1983)], other case law and regulations that preceded the grant condition." Reply Aff. of James J. Higgins, Exh. G. In affirming the District Court, the Court of Appeals implicitly concluded that there was no violation. These holdings cannot be relitigated under the guises raised by Fernandes in the present Complaint.

Even if res judicata did not preclude Fernandes' claims, Fernandes' Complaint is deficient for several other reasons. The

barrier of sovereign immunity discussed by the Court in its previous opinion has not been surmounted by Fernandes' filing of an administrative claim under the Federal Tort Claims Act because the applicable statute of limitations of two years has run. See 28 U.S.C. § 2401(b); Zeleznik V. United States, 770 F.2d 20, 22 (3d Cir. 1985). ("[A] suit against the United States under the Federal Tort Claims Act is the exclusive remedy for tort claims arising from the actions of government officials or employees."), cert. denied, 475 U.S. 1108 (1986). Moreover, although Fernandes has invoked the FTCA, he has not named the United States as a defendant, even though the United States is the only proper party in an FTCA suit. See. e.g.. Galvin V. OSHA, 860 F.2d 181, 183 (5th Cir. 1983) . Therefore, Fernandes cannot pursue claims against the EPA, the Administrator, or the Region II Administrator under the FTCA.

Fernandes also styles his Complaint as stating a claim under the citizen suit section of the Clean Water Act, 33 U.S.C. § 1365 (a) (2) , which permits a suit against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Act which is not discretionary. However, any claims he may raise under the purview of the citizen suit provisions must fail due to res judicata. The Court has already concluded, in its finding that there was no clear error in the denial of the waiver, that the EPA did not fail to perform any mandatory duty. To the extent that Fernandes challenges the EPA

regulations authorizing the grant condition, his claims are also barred by the statute of limitations governing challenges to agency action. See 5 U.S.C. §§ 701-706, Bench Opinion of March 27, 1995 ("Bench Op.") at 9-10.

To the extent that Fernandes asserts claims for violations of his civil rights pursuant to 42 U.S.C. §§ 1983, 1985, and 2000d, those claims are barred by the two year statute of limitations applicable to civil rights claims brought in this district. See N.J.S.A. 2A:14-2 (West 1990); Wilson V. Garcia, 471 U.S. 261 (1985) (holding that the statute of limitations for civil rights actions is the same as the state statute of limitation for personal injuries). Fernandes' state law tort claims are similarly barred by the two year limitation for bringing an action under state law.

However, Fernandes' complaints of civil rights violations fail for more substantive reasons. First, Fernandes has failed to allege that these federal actors acted under color of state law -- a requirement for maintaining a § 1983 action based upon denial of due process or equal protection. See U.S. Const. amend. XIV, § 1;' Artway V. Attorney General, 87 F.3d 1235, 1251, 1268 (3d Cir. 1996) . Second, his claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d must fail because contrary to Fernandes' position, such a claim requires an alleged discrimination based upon race, color or national origin. Fernandes' argument that equal protection applies when "any person" is denied a benefit simply lacks merit. Therefore, those claims would have to be dismissed for failure to state a claim upon which relief can be granted. Fernandes also claims that

Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980) requires the Attorney General to find that the regulations appearing at 40 C.F.R. §§ 35.925-8(b) and 35.925.13(e) exceeded the EPA's statutory authority. The Court does not pass on the question of whether Executive Order No. 12250 provides Fernandes with an independent right to sue. Instead, it notes that a government agency's "decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." Heckler V. Chaney, 470 U.S. 821, 830 (1985). The presumption against review may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers," (id. at 832-33), a situation not present here.

Moreover, Executive Order 12250, which generally prohibits discrimination in federally funded programs, is modeled upon Title VI. Thus, a claim based upon the Executive Order thus depends upon the viability of Fernandes' claim for relief under 42 U.S.C. § 2000d. As the Court has already stated that Fernandes has failed to state a claim under this statute, Count Eleven must also be dismissed.

Lastly, to the extent that Fernandes seeks damages for an alleged taking, his claims must be dismissed for lack of subject matter jurisdiction for the reasons stated on the record at the hearing of March 27, 1995. See 28 U.S.C. §§ 1346 (a) (2) and 1491(a) (1), Bench Op. at 17-22. For all of these reasons, the Complaint is dismissed with prejudice as to the federal defendants.

II. Whether the Claims Against Rockaway Should Be Dismissed And Whether Rule 11 Sanctions Should Be

Imposed.

Fernandes asserts that Rockaway's ordinance "denied a federal benefit," illegally charged an assessment, and intentionally inflicted emotional distress on him. Fernandes has already brought three separate lawsuits against Rockaway Township on various claims stemming from the same underlying facts -- the denial of the waiver and the limitations placed upon the property sold to him as a result of the EPA grant condition. All three lawsuits were concluded unfavorably to plaintiff, and the most recent dismissal of these claims was with prejudice. Fernandes appealed two of the three dispositions all the way to the United States Supreme Court; at all points, the matters were resolved against Fernandes.

It is clear that these claims against Rockaway Township are barred by res judicata. To the extent that they are not, they are also barred by New Jersey's entire controversy doctrine, which

> **1. 'It appears that Fernandes has a potential remedy. The federal defendants renew their position that Fernandes should submit a completed application for a waiver. They state that EPA's willingness to consider a completed application [with further information relating to the impact of the proposed activities] has not changed." Federal Defendants' Reply Brief at 6. The Court suggests that this route, while not a guarantee of success, is preferable to the continued litigation which has so far proven fruitless for plaintiff.**

requires joinder of "all parties with a material interest, one that can affect or be affected by the judicial outcome of a legal controversy." Cogdell V. Hospital Ctr. at Orange, 116 N.J. 7, 23

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

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transaction. Bennun V. Rutgers the State Univ., 941 F.2d 154, 163 (3d Cir. 1991) , cert. denied, 502 U.S. 1066 (1992) nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]" Fed. R. Civ. P. 11(b) & (c)

Having brought four separate and unsuccessful suits against various Rockaway defendants, it is clear that Fernandes has had more than the proverbial two bites of the apple.[3] This Court ruled in 1995 that the claims against Rockaway were barred by res judicata. **No matter how plaintiff restates or restyles his bases for relief, the issues and the claims are based upon the same facts and have been resolved against him.** To the extent that they have not, the claims are barred by the entire controversy doctrine. Plaintiff's dogged pursuit of claims against Rockaway, claims which have been dismissed by two different courts and passed on by the United States Supreme Court, can only be considered harassment this time. Accordingly, Rule 11 sanctions are appropriate.

Rule 11 instructs that a sanction "shall be limited to what is sufficient to deter repetition of such conduct." Fed. R. Civ. P. 11(c) (2) . Such sanctions may consist of "directives of a nonmonetary nature, . . . or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Id.

[3]In fact, one may argue that he has sampled the whole orchard.

Rockaway should be compensated for the costs it has expended in defending this baseless action. According to the Affidavit of Legal Services and Disbursements submitted by counsel for Rockaway, such costs total $3,168.51. However, because the Court is not persuaded that an award of costs is an adequate deterrent in this case, the Court will enter an order enjoining Fernandes from bringing any more complaints against Rockaway Township, its attorneys, the Rockaway Township Town Council, RVRSA, or any of their agents which arise from the denial of the Fernandes' grant waiver application in 1989 or the earlier sale of the property to Fernandes. It is the Court's view that only this type of sanction can deter future attempts at relitigation of this matter.

III. Whether A Default Judgment Should Be Entered Against Defendant NJDEP.

Fernandes notes that defendant NJDEP has not responded to his Complaint and moves for a default judgment against it. The Court is tempted to grant the relief sought by Fernandes against this party. However, a review of the Complaint reveals that the claims against NJDEP rely upon findings that the denial of the grant waiver or the grant condition were illegal or improper, or that NJDEP was a party to a violation of Fernandes' civil rights. These claims all fail for reasons discussed more fully above. Therefore,

the Complaint must also be dismissed as to the NJDEP.

Moreover, claims against the NJDEP should have been brought in either of the last two lawsuits concerning this subject matter. Because they were not, the entire controversy doctrine prevents Fernandes from being able to assert claims against this defendant now.

Conclusion

Having considered the arguments of counsel and litigant, and for the reasons stated above;

IT IS on this 12 th. day of August, 1997;

ORDERED that the Amended Complaint of plaintiff Nelson Fernandes and all the claims within be and hereby are dismissed with prejudice; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is dismissed as moot; and it is

FURTHER ORDERED that judgment be entered against Fernandes and in favor of defendant Rockaway Township Town Council in the amount of. $3,168.51; and it is

FURTHER ORDERED that plaintiff be and hereby is enjoined from instituting any further suits against Rockaway Township, its attorneys, the Rockaway Township Town Council, RVRSA, or any of their agents, which arise from the denial of the grant waiver in 1989 or the sale of the subject property to Fernandes.

SO ORDERED:

"s/ William H. Walls, U.S.D.J."

**EXH. – E May 13, 1996 Denial of Petition for Rehearing**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 95-5433 & 95-5646

---

NELSON FERNANDES,
Appellant
v.
ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND
TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY
REGIONAL SEWERAGE AUTHORITY);
E.P.A. (ENVIRONMENTAL PROTECTION AGENCY);
DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

---

(D.C. Civ. No. 94-cv-00338)

---

SUR PETITION FOR REHEARING

---

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, McKEE and SAROKIN, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

Circuit Judge

Dated: May 13, 1996

**EXH. – F Appellate Affirmation of the District Court Orders**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Nos. 95-5433 & 95-5646

---

NELSON FERNANDES,
Appellant
v.
ROCKAWAY TOWNSHIP, TOWN COUNCIL, AND TOWNSHIP ENGINEER; R.V.R.S.A (ROCKAWAY VALLEY REGIONAL SEWERAGE AUTHORITY); E.P.A. (ENVIRONMENTAL PROTECTION AGENCY); DORSEY & BELL; JOHN H. DORSEY; JOSEPH BELL

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Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 94-cv-00338
(Honorable William H. Walls)

---

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 15, 1996

Before: STAPLETON, SCIRICA and COWEN, Circuit Judges

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JUDGMENT ORDER

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After consideration of all contentions raised by appellant, it is

**ADJUDGED AND ORDERED that the district court's order entered May 15, 1995**, letter-order entered June 20, 1995, and letter-order entered August 28, 1995, **be and are hereby AFFIRMED.**

Costs taxed against appellant.

BY THE COURT,
Circuit Judge
fi
Attest:
DP. Douglas Sisk, Clerk, March 26, 1996

**EXH. – G Aug. 24, 1995 Order**

Re: Nelson Fernandes v. Rockaway Town Council and Township Engineer, et al. Civil Action No. 94-338 (WHW)

Dear Counsel:

This matter is before the Court on Defendant Environmental Protection Agency's motion for clarification.

## INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. Rockaway Township sold all property "as is" without any representations "as to the condition, area, or boundaries." Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally sensitive freshwater wetlands.

On September 21, 1985, Plaintiff Fernandes won ownership of lot 8 by bidding $10,000.00. Fernandes had a title search done at the time of purchase. On November 15, 1985, Fernandes took title to lot 8 by deed recorded with the Morris County Clerk. Planning to build a single family dwelling, Fernandes hoped to connect the home to an adjacent municipal sanitary sewer line. However, his application for the connection was rejected because of a grant condition imposed by the federal government.

In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreernent No. C340389-04-02, lots within an environmentally sensitive area ("ESA") cannot be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands. Fernandes' request for a waiver from EPA's ban to connect to the sewerage system was denied.

In January 1994, Fernandes filed a Complaint naming the following defendants: the Environmental Protection Agency ("EPA"), the EPA" Regional Administrator ("Regional Administrator"), Rockaway Township, Rockaway Town Council, Rockaway Township Engineer, Rockaway Valley Regional Sewerage Authority ("RVRSA"), Dorsey & Bell Law Off ice, John Dorsey and Joseph Bell. All of the above-named defendants moved to dismiss plaintiff's Complaint. Fernandes cross-moved for a partial summary judgment. The EPA and the EPA Regional

Administrator then moved for a partial summary judgment.

In its May 11, 1995 Order, this Court (1).dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, **(2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II and** (3) denied plaintiff's motion for partial summary judgment. EPA's motion for partial summary judgement was not decided. EPA presently moves for clarification as to the status of its motion for partial summary judgment. The motion for clarification is granted and this Court will now proceed with its determination of the partial summary judgment motion.

DISCUSSION

The EPA requests a finding that its denial of Fernandes 1 grant waiver was not arbitrary and capricious. A reviewing court must set aside agency action deemed " to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." **5 U.S.C. sec. 706(2) (A).** The court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Stoeco Dev. , Ltd. V. Department of Army Corps of Eng'rs, 701 F.Supp 1075, 1080 (D.N.J. 1988), appeal dismissed, 879 F.2d 860 (1989) (quoting Citizens to Preserve Overton Park V. Volpe, 401 U.S. 402, 415-16 (1971)). However, the court is "not empowered to substitute its judgment for that of the agency." Td. The standard of. review is "highly deferential"; agency findings are "entitled to a presumption of regularity." Id.

Before granting a waiver application, the EPA must be assured that the proposed activities do not violate the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387. Congress enacted the CWA in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. sec. 1251 (a). Thereafter, the discharge of dredged or fill materials from a point source into wetlands without a section 404 permit issued by the U.S. Army Corps of Engineers became prohibited. See 33 U.S.C. §§ 1311 (a), 1344.

Before granting a waiver application, the following factors are to be considered: (1) area extent of vacant parcel(s) which

contain ESAs (i.e., floodplains and/or wetlands); (2) extent and ecological quality of ESAs affected; and (3) amount of existing development surrounding the parcel(s). See Exhibits to Declaration of Robert W. Hargrove, Exh. D. To obtain the necessary information, an inspection of the property was conducted in March 1989 at the request of the EPA. Id. at Exhs. N, 0. The inspection revealed extensive wetlands, several small streams running from the property into White Meadow Lake, and significant development of surrounding lots. Id. Based on the above data, the EPA denied Fernandes' waiver application. The EPA has offered to

> reevaluate Fernandes' application provided that a more recent site inspection is performed and information demonstrating that any sewer system connections will not jeopardize the wetlands is provided.. Id. at Exhs. Q, R.

Based on the above, this court finds that the EPA considered the relevant factors and made no "clear error" when reaching its decision. The site inspection conducted in 1989 did not reveal a significant decrease in wetlands warranting reclassification. The property continues to be predominantly wetlands and therefore continues to be protected under the Clean Water Act. The EPA's decision to protect the wetlands is rationally based on the available information. No contravening evidence is offered by the plaintiff.

Accordingly,

IT IS on this 24 th. day of August 1995 ;

ORDERED that the EPA's motion for clarification is granted; and it is further

**ORDERED that EPA's motion for partial summary judgment is granted.**

WILLIAM H. WALLS, U.S.D.J.

**EXH. – H June 19, 1995 Denial of Reargument**

Dear Counsel:

This matter is before the Court on plaintiff's motion for reargurnent.

INTRODUCTION

On August 6, 1985, Rockaway Township held a public sale of real property by auction. The terms of the public auction were that the property was sold "as is" and that "no representations of any kind are made by the Township of Rockaway as tQ the condition, area, or boundaries of the property herein relevant. " Lot 8 was one of the land parcels on which the public bid. A portion of lot 8 was covered by environmentally-sensitive freshwater wetlands. On September 21, 1985; plaintiff won ownership of lot 8 by bidding $10,000.00. plaintiff had a title search done at the time of purchase. On November 15, 1985, plaintiff took title to lot 8 by deed recorded with the Morris County Clerk. Plaintiff later purchased lot 9 which is adjacent to lot 8. He planned to subdivide the two lots and build a single family dwelling. plaintiff hoped to connect the single family home to the municipal sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government. In 1983, the federal government gave Rockaway Township a grant so that the Township could build a sanitary sewer system. According to Grant Agreement No. C340389-04-O2, lots within an environmentally sensitive area could not be connected to federally funded sewers. The purpose of the condition is to protect the surrounding wetlands. plaintiff's lots are two of approximately 140 lost in the Township which were impacted by the EPA grant condition. plaintiff attempted to obtain a waiver from EPA's ban, but defendant Rockaway Valley Regional sewage Authority received a letter on May 5. 1989 from the EPA's Acting Regional Administrator denying the request.

All of the defendants moved to dismiss plaintiff's various claims against them. plaintiff cross-motioned for partial summary judgment. EPA, in addition to its motion to dismiss, moved for partial summary judgment against the plaintiff.

In its May 11, 1995 Order, this Court (1) dismissed with prejudice all of plaintiff's claims against defendants Rockaway Township Town Council and Township Engineer, Dorsey and Bell, John Dorsey and Joseph Bell, and Rockaway Valley Regional Sewerage Authority and its Executive Director, **(2) dismissed without prejudice all of plaintiff's claims against United States Environmental Protection Agency and Regional Administrator of Region II** and (3) denied plaintiff's motion for partial summary judgement. EPA's motion for partial summary judgement was not decided.

Discussion

Under Rule 12(I) of the United States District Court Rules, the party moving for reargument must state "concisely the matters or controlling decisions which [said party believes the Judge or Magistrate has overlooked." Id. If the motion is granted, "the matter shall be reargued orally." Id.

The primary determination in a motion for reargument is whether "dispositive factual matters or controlling decisions of law" were overlooked by the Court. Pelham v. United States, 661 F.Supp. 1063, 1065 (D.N.J. 1987). A motion for a reargument is not an opportunity for a party to presen't new arguments. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988). Where the Court has not overlooked facts and cases properly presented at the time of the motion, the Third Circuit has consistently denied relief. See Egloff v. New Jersey Air National Guard, 684 F. .Supp. 1275 (D.N.J. 1988). A party's disagreement with the Court's decision "should be dealt with In the normal appellate process, not on a motion for reargument." Florham Park Chevron, 680 F. Supp. at 163.

Simply stated, plaintiff sets forth no matter or controlling decision which was overlooked by this Court. Therefore, plaintiff's motion for reconsideration is denied.

## CONCLUSION

For the reasons set forth in this Letter Opinion, it is on this 19 th. day of June 1995

ORDERED that Plaintiff's motion for reargument be and hereby is **denied**.

"s/ William H. Walls, U.S.D.J./

**EXH. – I May 11, 1995 Order**

BOYAR, HIGGINS & SUOZZO, P.A. (JH 8207)
A Professional Corporation
10 Park Place, Suitte. 415
Morristown, New Jersey 07960
(201) 538-8008
Attorneys for Defendants, Rockaway Township
Town Council and Township Engineer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES, Civil Action # 94-338(WHW)
Plaintiff,
ROCKAWAY TOWNSHIP TOWN
COUNCIL AND TOWNSHIP
ENGINEER, et al
Defendants .
x

*ORDER DISMISSING AMENDED COMPLAINT AS TO ALL DEFENDANTS*

*THIS MATTER* having been opened to the Court on March 27, 1995, honorable William H. Walls, U.S.D.J. presiding, upon defendants' motions brought pursuant to Fed.R.Civ.P.12(b)(l), Fed..R.Civ.P.12(b) (6) and Fed.R.Civ.P.56 to dismiss the Amended Complaint, by defendants, Rockaway Township Town Council and Township Enginee:r by Boyar, Higgins & Suozzo, P.A. (James J.Higgins, Esq. appearing); by defendants, United States Environmental Protection Aqency and Regional Administrator of Region II, by the United States Department of Justice (Mark A. Rigau, Esq. appearing); by defendants, Dorsey & Bell, John Dorsey and Joseph Bell by Dorsey & Fisher (Douglas R. Cabana, Esq. appearing); and by defendants, Rockaway0 Valley Regional Sewerage Authority and Executive Director, by McManimon & Scotland (Joseph Maraziti, Esq. appearing); and on cross-motion of plaintiff, Nelson Fernandes for partial summary judgment (Nelson Fernandes, pro se appearing), and the Court having considered the papers filed by the moving parties and those submitted in opposition, having heard oral argument on March 27, 1995 and for

good cause shown, all as set forth on the record, 1995:

*IT IS* on this 11 th. day of May, 1995:

*ORDERED,* that the motion of all defendants be and the same are hereby granted; and it further

*ORDERED,* that the Amended Complaint be and the same is hereby dismissed with prejudice as to defendants, Rockaway Township Town Council and Township Engineer; Dorsey & Bell, John Dorsey and Joseph Bell; and Rockaway Valley Regional Sewerage Authority and its Executive Director, with no costs; and it is further

***ORDERED,* that the Amended Complaint be and the same is hereby dismissed without prejudice, as to defendant, United States Environmenta1 Protection Agency and Regional Administrator of Region II**; and it is further

*ORDERED,* that plaintiff's motion for partial summary judgment be and the same is hereby denied; and it is further

*ORDERED,* that counsel for defendants, Rockaway Township Town Council and Township Engineer, shall serve a copy of this Order upon plaintiff pro se and all counsel appearing within 10 days of it having been entered.

"s/WILLIAM H. WALLS, U.S.D.J."

**EXH. - J Mar. 27, 1995 District Court Opinion**
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil No. 94-0338(WHW)

TRANSCRIPT OF PROCEEDINGS - March 27, 1995

FERNANDES, Plaintiff,

-vs-

ROCKAWAY TOWNSHIP, ET AL, Defendants.

B E F 0 R E:
THE HONORABLE WILLIAM H. WALLS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

NELSON FERNANDEZ, PRO SE.
BOYAR, HIGGINS & SUOZZO, P.A.
BY: JAMES J. HIGGINS, ESQ.,
-and-
MC MANIMON & SCOTLAND, ESQS.,
BY: JOSEPH J. MARAZITI, JR., ESQ.,
-and-
DOUGLAS R. CABANA, ESQ.,
Attorneys for Defendants.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

PHYLLIS T. LEWIS, C.S.R.
OFFICIAL COURT REPORTER - U.S. DISTRICT COURT
P.O. BOX 25588, Newark, New Jersey, 07101
(201) -645-3677

Start of Page 2

(March 27, 1995)
(The foregoing was not ordered at this time.)

THE COURT: In August of 1985 Rockaway Township held a public sale of real property. That was done by auction. Property was sold "as is." No representations of any kind were made by the Township of Rockaway as to the condition, area or boundaries of the property sold.

Lot 8 was one of the land parcels which was available for bidding by the public. A portion of that lot was covered by the environmental sensitive fresh water wetlands.

The present plaintiff, Mr. Fernandez, won by bidding $10,000 for Lot 8, and he had a title search done at time of purchase and took title by deed recorded with the Morris County Clerk.

He later purchased Lot 9 adjacent to Lot 8, and according to his representations, planned to divide the two lots and build a single-family dwelling. He hoped to connect it to the sanitary sewer line that ran adjacent to his lots. However, his application was rejected because of a grant condition imposed by the federal government.

In 1983 the federal government had given or gave Rockaway Township a grant in order that the Township could build a sanitary sewer system.

Acording to that grant agreement, lots within that

Start of Page 3

environmental sensitive area could not be connected to federally funded sewers. The purpose of the condition was to protect the surrounding wetlands.

Unfortunately, plaintiff's lots are two of approximately 140 lots in the Township which were impacted by that grant condition.

Mr. Fernandez attempted to obtain a waiver from that ban of the EPA, but in 1989 Rockaway Valley Regional Sewerage Authority received a letter from the EPA's Acting Regional Administrator denying the request.

Consequently, Mr. Fernandez sought the aid of Federal Court, U.S. District Court for this district, and brought a

complaint against Rockaway Township Town Council and the Township Engineer, and that complaint or a later amended complaint alleged ten causes of action, including alleged material misrepresentation, violation of statute and fraudulent concealment.

That was dismissed by Judge Barry of this Court on November 28, 1990 determining that it might be better for plaintiff to commence his action before the State Court, which he did.

Apparently in 1991, and again in 1992, his State Court actions were dismissed by the Superior Court of New Jersey.

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**He had in the amended complaint before the State Court alleged:**

**(1)** That the sale of property to him by Rockaway Township was in violation of state statute 40:A12-13.

**(2)** That there was a malicious policy and custom of Rockaway Township Town Council to sell worthless lots in violation of 42 USC section 1983.

**(3)** That the Township Engineer had conspired with the Town Council in carrying out this policy with regard to the sale of lots.

**(4)** That the Township Council members conspired among themselves to effect the sale of lots which represented a malicious abuse of governmental power.

**(5)** That there was, in addition, conspiracy to have the Township conceal the EPA grant condition.

**(6)** That the Township arbitrarily denied requests from owners of wetland lots to conceal the original conspiracy.

**(7)** That the Rockaway Township Engineer harrassed plaintiff in violation of his constitutional rights.

**(8)** That such rights were infringed by the Township Engineer, which represented discrimination upon plaintiff who was a member of a minority.

**(9)** That there was fraud committed upon him and the public when the Rockaway Township made an "as is" sale, making it appear to conform to statutes.

Start of Page 5

And lastly, that the Township sale of the lots contrary to the statute represents a taking and implied promise to pay compensation.

As I said before, this complaint was dismissed in two parts really by two Superior Court Judges, and thereafter exercising the right of automatic appeal to the Appellate Division. Again, Mr. Fernandez lost. The Appellate Division asserting in dismissing the matter, "We see no basis for breach of contract claims advanced by plaintiff to the extent he relies upon tort claims because of the personal injury aspect of the federal claims." He was barred by the statute of limitations, and also, that the claims pursuant to 42 USC section 1983 were barred by the New Jersey's two-year statute of limitations.

Thereupon, Mr. Fernandez sought relief from the New Jersey Supreme Court, which denied certification in March of 1993. He petitioned the Court for reconsideration which again was denied in May in 1993.

Thereafter he sought writ of certiorari from our United States Supreme Court, which was denied in October of 1993.

I think I fairly represented the procedural history, and now he commences this present action before this Court, having done so in January of last year, January 24, 1994.
Start of Page 6

As I said originally to him, I repeat to all parties, with regard to the claims brought against Rockaway Township, the Town Council and Township Engineer, all of those, in my opinion, have been the subject of res judicata. His claims against Rockaway Township, the Town Council and the Township Engineer have been adequately and fully, in my opinion, presented and tested before trial judges and through the process of appellate review.

These matters, as I said, were denied. The merits of them were found to be wanting by two Superior Court judges and later by the Appellate Division, which action was reviewed by our highest tribunal. Because these claims have already been adjudicated, they are therefore barred. All of the elements of res judicta are satisfied, and his claims against these parties are dismissed.

Plaintiff's claims brought against defendants Dorsey & Bell Law Office, John Dorsey and Joseph Bell, are dismissed by the doctrine of collateral estoppel. The thrust of that type of determination is that identical issues have been decided on prior adjudication. There has been a final judgment on the merits

The party against whom the bar has been asserted either was a party or in privity with a party of the former adjudication, and the party against whom the bar is associated had a full and fair opportunity to litigate the

Start of Page 7
issues in question.

Defendants John Dorsey and Joseph Bell of the Dorsey & Bell law firm represented Rockaway Township in the first action. Plaintiff alleged in discovery, that said defendants were aware of the Rockaway Township's policy to sell wetland lots.

Furthermore, plaintiff contends defendant Joseph Bell admitted alleged concealment before the Superior Court. The issue of whether Rockaway Township concealed the grant petition has already been adjudicated.

The claim asserting knowledge of Rockaway Township's concealment made against the attorneys in the law office must per force fail if a court already determined that Rockaway Township did not conceal the grant condition, or that the burden of proof with regard to this assertion has not been met.

Therefore, these matters having already been adjudicated adversely against him, they have to be dismissed, as I do now dismiss them, against the individual attorneys.

**Now, Mr. Fernandez comes with an attack upon the actions of the EPA and Regional Administrator. Basically he seeks $20 million against the EPA and the Regional Administrator. I will be very succinct about it. The Government only permits itself to be sued under sovereign**

Start of Page 8
**immunity, and here there has been no waiver of sovereign immunity. Therefore, any seeking of $20 million must be dismissed because such claims are barred by the doctrine of sovereign immunity. The United States is immune from suit except if it consents to be sued.**

In relation to his claim against the Regional Administrator of Region II, he does not name a particular person. No individual is on notice of a lawsuit against him personally, and no one is aware of an obligation to defend. Should we treat this then as an official capacity claim, official capacity suits are pleaded as actions against the entity because the entity is the real party in interest. Under those circumstances, the plaintiff can only recover damages from such an entity, unlike a circumstance of where an individual has been named in the complaint specifically.

Here the plaintiff does not even name an individual. It appears that he is simply using this in an attempt to recover more money from the Government.

However, as I said before, the Government only can consent to be sued, and in this capacity claim for better status, we note that the Government has not waived immunity.

Plaintiff argues that immunity is waived under the Federal Tort Claims Act 28 USC sections 1346(b), 2671-2680. However, he has not complied with the Federal Tort Claims administrative claim requirement which is a jurisdictional

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prerequisite to maintaining a suit. See Livera vs. First National State Bank of New Jersey, 879 F.2d 1186, 1194, a Third Circuit decision in 1989, which has been reviewed by our own United States Supreme Court in denying cert, 493 U.S. 937.

Mr. Fernandez also argues that immunity is waived under the National Environmental Protection Act, but again, the government must waive sovereign immunity, particularly where he seeks damages because of a violation of that act does not give rise to monetary damages. Fund for Animals, Inc. vs. Espy, 814 F. Supp. 142, 151, a 1993 case from the District of Columbia teaches us so.

**Plaintiff brings claims under 42 USC 1981, 1982, 1983 and 2000(d), claiming immunity having been waived under the Federal Tort Claims Act**, but as I noted, he has not complied with the jurisdictional prerequisite.

Additionally, plaintiff says that he wants $20 million in damages, and he makes a takings claim. Under the

Tucker Act, soverign immunity is waived and recovery on a takings claim is permissible in Federal District Court if the recovery is limited to $10,000. Otherwise, he must seek the forum of the United States Court of Federal Claims. However, again, there has been no waiver of immunity.

**With regard lastly to his challenge to the EPA grant condition, that is subject to a six-year statute of**

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**limitations found in 28 USC section 2401(a). That cause of action consists of the plaintiff's rights claimed and the defendant's infringement of that right. The grant of that right accrued when the condition became final, when it was accepted in February of 1984. The statute of limitations began to run then. Plaintiff's complaint was filed on January 27, 1994. His challenge is barred by the statute of limitations and is dismissed.**

Plaintiff's claims against the EPA and the Regional Administrator are dismissed so, too, against Rockaway Valley Sewerage Authority, because there is no evidence that would independently link RVRSA, which is Rockaway Valley Regional Sewerage Authority to any claimed acts.

Any claimed acts against that authority are dependent upon any cognizable acts that plaintiff could make against other defendants, which unfortunately he failed to do. For those reasons, the matters are dismissed.

(The matter was concluded.)

**EXH. – K Amended Complaint**

Nelson A. Fernandes, Pro Se
9FoxRun
Denville, N.J. 07834

**UNITED STATES DISTRICT COURT**
DISTRICT OF NEW JERSEY

Civil Action No: 96-5791 **(WHW)**

**CIVIL ACTION**
**AMENDED COMPLAINT**

---

**Nelson Fernandes,**
Plainflff,
-vs-

**EPA , Administrator of the EPA,**
**Regional Administrator for Region II,**
**Commissioner of NJDEP,**
**Rockaway Township Town Council,**
**Attorney General,**
Defendants.

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**PARTIES**

**Plaintiff:** Nelson Fernandes, 9 Fox Run, Denville, N.J. 07834, (201) 627-2138 (Pro-Se)

**Defendants:** Administrator of EPA, 401 M.St. S.W., Washington, D.C. 20460, Reg. Admin. for Region II, Rm. 937A, 26 Federal Plaza, N. Y., N.Y. 10278, Commissioner of N.J.D.E.P., CN402, Trenton, N.J. 08625-0029, Rockaway Township Town Council, 65 Mt. Hope Rd., Rockaway 07866-1698. Attorney General, USD of Justice, 950 Pennsylvania NW, Wash., DC 20530

**JURISDICTION**

Federal Tort Claims Act, 28 U.S.C. §§ 1346(a) (b); 2671-2680 (1988) ("FTCA").
42 U.S.C.§ 1983 42 U.S.C.§ 1985(3) 33 U.S.C.§ 1251 et eq.
28 U.S.C. § 1331 28 U.S.C. § 1332 28 U.S.C. § 1366
28 U.S.C. § 1343 42 U.S.C. § 2000d et seq.
5 U.S.C. §701 et seq.
28 U.S.C. § 2201 28 U.S.C. § 1361 28 U.S.C. §1651

Pendent jurisdiction of pendent state claims that arise out of the same nucleus of operative facts. United Mine Workers V. Gibbs, 383 U.S. 715 (1966).

**PLAINTIFF DEMANDS A JURY TRIAL**

Each fact or allegation is to be considered a pertinent part of any other claim if needed to complete that claim, so that claim is not considered defective by its absence.

Rockaway Township will be referred to as "Rockaway", the Rockaway Valley Regional Sewer Authority will be referred to as "RVRSA", the Environmental Protection Agency will be referred to as "EPA", the N.J. Department of Environmental Protection will be referred to as "NJDEP", the Clean Water Act will be referred to as "CWA".

**PERTINENT FACTS AND STANDING.**

1. Rockaway Township knew its ordinance denying sewer service was illegal. So it fraudulently concealed the fact that it relied on its ordinance. Rather than disclose this fact, it sold land affected by said ordinance to plaintiff. The township then approved plaintiffs subdivision although it could not be connected to the sewer, nor be granted a permit to build a septic system. After the subdivision was approved, the township denied plaintiff building permits by making it appear that said grant condition occurred after the subdivision was approved.

2. Plaintiff was denied the right to build as the result of said grant condition. However, the only authority that existed to deny connection was the town's ordinance that was concealed to make it

appear that Rockaway was acting in support of federal authority. After being denied the right to build, plaintiff followed the procedures provided by Rockaway to obtain a grant waiver.

3. On October 21, 1988 the NJDEP, Division of Coastal Resources exempted plaintiffs property from having to obtain a freshwater wetlands permit.

4. On April 1, 1989, plaintiff received a letter from the NJDEP, Division of Water Resources stating that it was reconfirming its recommendation to deny plaintiffs waiver, although plaintiff never received the original recommendation to deny his waiver.

5. On May 5, 1989, plaintiff received a copy of EPA's official denial of his grant waiver that relied on NJDEP's recommendation.

6. Plaintiff met with the EPA and NJDEP on May 30, 1989. During that meeting, Mr. Llewellyn, EPA's attorney, admitted plaintiff could fill his lots based on an ACOE permit, thus destroying the wetlands on his lot, but refused to allow plaintiff to connect to the sewer. There was no mention of nonpoint source mnoff.

**STANDING**

7. Plaintiff was provided sewer connection slips by Rockaway's Engineering Dept. to show that connection points were provided to service his lots.

**8. Plaintiff paid a sewer assessment in detrimental reliance of these slips, thus entitling him to sewer service, that was later denied by Rockaway Township, RVRSA, NJDEP, and EPA.**

9. Plaintiff had the lots subdivided in detrimental reliance of the sewer connection slips and the assessment that he paid.

10. Rockaway Township, RVRSA, NJDEP, and EPA dealt with plaintiff as a person entitled to sewer service, but denied the right by the grant condition. Processing plaintiffs grant waiver appeal until denied on May 5, 1989, represents an affirmative act amounting to a waiver of their right to challenge plaintiffs right to enforce a Title VI regulation, or challenge the validity of the regulation they rely on.

**11. Plaintiff is a third party beneficiary to Grant No. C340389-04.**

12. Plaintiff is entitled to service since 40 CFR Ch. I, Subpart. F, §30.600 (E) requires: These authorities prohibit you from excluding any person from paflicipating in, denying them the benefits of. . . any program or activity involving federal financial assistance.

**13. Plaintiff filed a notice of intent to sue in accordance with the citizen's suit provision of the Clean Water Act, which provides a waiver of EPA's sovereign immunity.**

CLAIM ONE - EPA's, Mr. Hargrove, proposed a Denial of Due Process & Equal Treatment.

1. Robert Hargrove, as a soils conservationist, wrote a memo on 4/23/79 on "Limited access interceptor sewers as they relate to the construction grant program in New Jersey" (Exh. A).

2. His memo went beyond the concept in the article that it was based on, by recommending a grant condition to limit sewer hook-ups that is part of Grant No. C340389-04.

3. He reviewed cases related to sewer service but never considered the Title VI regulation or other federal court rulings that bar the grant condition that he recommended.

4. His "EPA Authority Section" contained no statutory, regulatory, or judicial authority to support EPA using a grant condition, nor did it present the federal law that prohibits its use.

**5. Mr. Hargrove knew N.J. septic regulations would not allow permits for septic systems on lots within 100' of a sewer line (Exh. A, p.2). Hence, the grant condition caused plaintiff a denial of state rights and a due process violation, since no procedure is adequate to protect his right.**

6. Mr. Hargrove's failure to address a large body of federal law that would be violated, shows he recklessly disregarded plaintiffs rights.

7. Regional Administrator abdicated his duty by failing to have the Attorney General determine if Mr. Hargrove's concept complied with federal and state law, thus failing to perform the nondiscretionary duty of complying with enabling authorities.

8. Plaintiff asks the court to review the allegations in this claim.

**CLAIM TWO** - Mr. Sullivan Instituted a Policy to Deny Due Process and Equal Treatment.

1. Mr. Sullivan, Chief of EIS Preparation Branch, wrote a policy memo dated 5/25/79 on the subject of "Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas" (Exh. B). His memo required the initial use of the grant condition to deny sewer hookups in grants to be provided to Cape May, New Jersey and two others areas, which precede the grant provided to the RVRSA that affects plaintiff.

2. Mr. Sullivan relied on Mr. Hargrove's memo although on its face it results in a denial of due process and equal treatment (Exh. A, p. 2).

3. Mr. Sullivan also relied on regulation 35.925-8(b) that appears in Attachment 1 to his memo as the authority for imposing grant conditions (Exh. B, p.6).

4. This regulation exceeds EPA's statutory authority by disregarding federal law that prevents conditions relating to plaintiffs rights, unless there is explicit statutory authority.

5. Mr. Sullivan also relied on regulation 35.925-13(e) as providing authority to impose a grant condition to restrict sewer hook-ups (Exh. B, p.7). This regulation exceeds EPA's statutory authority, thus denying due process and equal treatment, when that condition was used.

6. Plaintiff asks the court to declare whether the preceding regulations fail to stay within the authority of the enabling statute.

**PAGE 2**

7. Mr. Sullivan knew these regulations were inadequate by recognizing conditions of this type were only accepted when instituted by the state (Exh. B, p. 2). However, no such law existed in New Jersey.

**8. Mr. Sullivan then instituted a scheme to deny due process in his memo, under "Strategy and Timetable" (Exh.B, p.5) "6. Negotiate with State to require them to amend its review procedure to reject grant applications and deny sewer extension permits.**

9. EPA had NJDEP deny waiver requests, so EPA could deny plaintiffs waiver on the grounds that it was supporting state action, in order to fraudulently conceal their own violations.

10. This conspiracy represents an affirmative act amounting to a waiver of EPA's and NJDEP's right to rely on statute of limitations or other defense that would bar judicial review.

**11. Mr. Sullivan's policy constitutes a "conscious and express" abdication of EPA's enforcement duties under the Clean Water Act (CWA).**

12. EPA failed to perform a nondiscretionary duty by creating a wetland lots classification in a grant condition instead of the manner provided by 33 U.S.C. § 1316.

13. EPA failed to perform a nondiscretionary duty by invading this state's independence when it negotiated a denial of due process with NJDEP, to affect its quasi judicial proceedings.

14. On July 11, 1980, Eckardt C. Beck, Assistant Administrator for Water and Waste Management, wrote a memo approving the use of Mr. Sullivan and Mr. Hargrove's concept, making this an official EPA discriminatory policy (Exh. C).

15. Endorsing a policy that negotiates a denial of due process and equal treatment with a state agency is a failure to perform the nondiscretionary duty of constitutional conduct.

16. The EPA proceeded with it plan to cause plaintiff intentional infliction of emotional distress as the means that would prevent him from challenging their action.

17. Plaintiff prays the court review the above and declare the rights of the parties on each of the above issues.

**CLAIM THREE** - EPA and NJDEP's Conspiracy.

**1. The underpinnings of this conspiracy are contained in Mr. Sullivan's 5/25/79 memo (Exh. B, p. 5) "6. Negotiate with State to require them to amend its review procedure to reject grant applications and deny sewer extension permits.**

2. Presenting this memo in the earlier case represents the first disclosure of this ongoing concealment of EPA's conspiracy with the NJDEP.

3. Mr. Sullivan's policy led EPA to "consciously and expressly" abdicate its enforcement duties under the Clean Water Act (CWA) by conspiring with the NJDEP to have them review and recommend denial of plaintiffs grant waiver appeal in violation of due process. This conspiracy was done in violation of 42 U.S.C. 1983 and 1985.

4. The EPA failed to perform a nondiscretionary duty by

involving the NJDEP in the grant waiver review process.

5. The EPA directed the RVRSA to submit grant waiver appeals to the NJDEP.

6. NJDEP, Division of Water Resources recommendation to deny plaintiffs grant waiver amounted to an affirmative act waiving its right to claim the protection of the statute of limitations and any other affirmative defense that would bar a judicial review.

**PAGE 3**

**7. NJDEP, Division of Water Resources acted in furtherance of this conspiracy by reviewing Title VI grant waiver appeals, doing a field study, preparing its report, and by recommending the EPA deny plaintiffs appeal as Mr. Sullivan had planned (Exh. E).**

8. The review done by the Division of Water Resources, Municipal Waste Water Assistance Element was done at the direction of the Commissioner, making him a party to for this ongoing conspiracy.

9. Plaintiff seeks a declaratory judgment as to the rights of the NJDEP, EPA and plaintiff, or in the alternative, to compel the EPA and NJDEP perform its statutory duties. Plaintiff seeks damages for EPA and NJDEP's invidious discrimination that has damaged plaintiff.

**10. NJDEP's ongoing participation in this conspiracy abrogates its Eleventh Amendment Immunity in accordance with 42 U.S.C. § 2000d-7(b), for NJDEP's denial of equal treatment by recommending a denial of plaintiffs grant waiver to further the conspiracy.**

**11. This statute abrogates immunity for violations after October 21, 1986.**

12. Plaintiffs complaint against all the defendants is timely by virtue of the doctrines of waiver, estoppel, fraudulent concealment and the continuing violation theory.

13. EPA denied plaintiffs grant waiver in support of NJDEP's recommendation in furtherance of ifs conspiracy to make it appear that it was acting in support of state action, which amounts to a fraudulent concealment and denial of equal protection that resulted from their joint effort (Exh. F).

14. 33 U.S.C. §§§ 1316,1317, & 1319 do not provide the EPA with authority to deny sewer service via a grant condition or to make the NJDEP a party to such a denial.

**15. This conspiracy was designed to mask the existence of a cause of action by creating a facade of joint federal and state action, requiring both the EPA and NJDEP be parties in this lawsuit in order to show that each lacks the requisite authority and to prove the recommendation of the NJDEP, taken with EPA denial of a grant waiver represents the conspiratorial act.**

16. Plaintiff asks the court to declare whether EPA and NJDEP conspired to deny his rights.

**CLAIM FOUR** - NJDEP's Violation of 42 U.S.C. 1983.

**1. NJDEP, Division of Coastal Resources granted plaintiff a freshwater wetlands exemption on 10/21/88 (Exh.D). This exemption ended NJDEP's state authority to act further.**

**2. EPA conspired with NJDEP, Division of Water Resources to have them recommend denying plaintiff sewer service under the color of state law, in order to deny plaintiffs property right to a Title VI benefit, and to deny him equal treatment, thus violating 42 U.S.C. 1983.**

3. NJDEP discriminated against plaintiff by recommending a denial of sewer service in furtherance of its conspiracy with the EPA, so EPA could deny the waiver in reliance of their act.

4. Plaintiff asks the court to declare whether NJDEP violated plaintiffs federal rights.

**CLAIM FIVE** - Equal Protection Violation.

1. Regulations 35.925-8(b) and 35.925-13(e) rely on implied CWA authority.

2. U.S. Supreme Court held that grant conditions require explicit statutory authority several years before the EPA imposed its grant condition of the RVRSA.

3. The EPA used it rightful authority to impose grant conditions to make the United States liable for an act that was carried out in the name of the government, and has injured people who

were intended beneficiaries of a federal program, so that the government must stand behind the injury done to those who were supposed to benefit, not be injured.

4. The EPA failed to perform its duty by attaching their grant condition to the grant provided to the RVRSA.

**5. EPA failed to perform its duty in accordance with its authority, which has resulted in a denial of both; due process and equal protection by instituting regulations that exceed the explicit authority of the Clean Water Act, and constitutional limitations.**

6. Plaintiff asks the court to declare whether EPA violated equal protection.

**CLAIM SIX** - Third Circuit and Supreme Court Limited EPA's Use of Grant Conditions.

1. EPA's Cape May grant condition led to a Third Circuit case, which EPA actively participated in. That case held that EPA exceeded CWA authority, and was exercising authority over people who are not directly subject to EPA authority.

2. That holding acts as a conclusive bar to EPA's imposing it grant condition in any grant in the Third Circuit. The decision of which predates EPA's grant condition on the RVRSA.

**3. The Regional Administrator's grant condition imposed on the RVRSA on 2/9/84, represents a failure to perform the nondiscretionary duty created by the Third Circuit holding.**

4. EPA's grant condition caused RVRSA members to pass ordinances in support of a contract condition that fails to provide explicit statutory authority and also violates the law of this Circuit.

5. EPA was fully aware of these holdings, so its imposition of the same condition on the RVRSA amounted to an intentional constitutional discrimination aimed at causing plaintiff damage and intense emotional distress.

6. Plaintiff asks the court for a declaratory judgment on this claim.

**CLAIM SEVEN** - The EPA Grant Condition Violates an EPA Regulation and Title VI.

1. EPA failed to perform the nondiscretionary duty in 40 CFR Ch. I, Sub. F, §30.600 (E), by requiring the RVRSA violate

this regulation by complying with its grant condition, after it imposed a duty to not violate the regulation.

2. Publishing this regulation in the annual release of the federal register up to 1995, shows this was the prevailing regulation that should have governed EPA's conduct.

3. EPA's "failure to comply **with regulations is a fatal flaw** to administrative action"

4. Plaintiff as a third party beneficiary seeks to enforce this regulation. Plaintiff also seeks compensatory damages for EPA's intentional discrimination and intentional emotional distress.

5. The violation of this regulation represents a violation of the principles in Title VI upon which this regulation and plaintiffs alternative right to enforce this regulation are based.

6. The foregoing regulation provides a constitutionally protected property interest that EPA's grant condition denies, thus representing a denial of equal protection.

7. If plaintiff is foreclosed from enforcing this regulation then the procedural safeguards to protect his interest are insufficient to protect it, thus resulting in a due process violation.

8. Plaintiff asks the Court to declare plaintiffs rights on this claim.

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**CLAIM EIGHT** - Administrator / Regional Administrator Failed to Comply with the CWA.

1. EPA's violation of a U.S. Supreme Court ruling that bars using a grant condition without explicit statutory authority renders the condition "void ab initio." Hence, EPA is subject to a damages remedy, including extraordinary damages. Those violations are recapped, as follows:

(a) Taking private property without paying compensation contrary to Court of Claims holding, although EPA's conduct forecloses compensation for a taking.

(b) 40 CFR 35.925-13(e) denies intended beneficiaries due process and equal treatment in violation of the V and XIV Amendments.

(c) Regional Administrator failure to verify that Mr. Hargrove's memo was within the limits of CWA authority.

(d) 40 CFR 35.925-8(b) and 35.925-13(e) exceeds the statutory authority in 33 U.S.C. § 1319.

(e) The EPA exceeded Title VI authority by involving the NJDEP in the review of plaintiffs grant waiver appeal.

(f) Classification "wetland lots" without legal authority.

(g) The Administrator ratified an equal treatment and due process violation.

(h) That violation of equal protection represents a waiver of EPA's sovereign immunity.

(i) Imposing the grant condition without explicit statutory authority.

(j) EPA's conspiracy with the NJDEP.

(k) Violating the holdings of Cape May Greene.

(1) Violating 40 CFR Ch. I, Subpart F, §30.600 (E.

2. Not withstanding the foregoing reasons, EPA also failed to perform the nondiscretionary duty in § § § 1316, 1317 and 1319 which requires identification, regulation and enforcement, not a denial of a federal benefit that fails to comply with these statutes, while it violated a regulation.

3. The grant waiver process denies plaintiff due process since its procedural safeguards are insufficient to protect plaintiffs third party right to connect to the sewer. The grant waiver process subjects plaintiff to EPA's discretion as affected by its conspiracy, instead of the explicit statutory requirements in §§§ 1316,1317 and 1319.

4. EPA's grant condition evinces a belief by the Administrator that wetland lots are introducing pollutants into publicly owned treatment works, since EPA's authority to deny the effluent standard is limited to that reason. Hence, EPA Regional Administrator failed to perform his nondiscretionary duty in accordance with § § 1316 and 1317, which calls for the identification of "new sources' that will be subject to regulatory guidelines and enforcement. Instead, he imposed a grant condition that circumvents the nondiscretionary enforcement duties in § 1319.

5. Or, the Administrator believes that wetland lots increases "nonpoint source" runoff pollution. Hence, denying connection to the sewer, prevents construction in order to prevent the runoff, which fails to perform the duty in 33 U.S.C. § 1316 that allows classification and subsequent regulation and enforcement in accordance with sections 1317 and 1319.

6. EPA believes that preventing connection to the sewer prevents runoff pollution by preventing development of vacant wetland lots. This theory fails to address the runoff from existing homes built on wetland lots that are allowed to connect to the sewer. Hence, the grant condition bears no relation to the objective sought by treating members of the same class differently, amounting to a denial of equal treatment.



7. EPA's failure to require home owners on wetland lots to obtain a permit for the runoff that EPA considers damaging to the waters of the United Stated represents a waiver of its right to argue that said runoff is damaging to said waters. EPA's failure to exercise its authority against these owners further proves the denial of sewer service to vacant wetland lot owners was aimed at taking private property under the guise of regulation.

8. 33 U.S.C. § 1365(a)(2) provides a waiver of immunity to file an action against the Administrator and Regional Administrator where there is alleged a failure to perform any act or duty under this chapter which is not discretionary.

9. 33 U.S.C. § 1365(b) on notice, provides that an action can begin with notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Plaintiff moved in accordance with this provision. Furthermore, notice was given in the manner prescribed by regulation.

10. 33 U.S.C. § 1365(e) also provides a waiver of immunity without the need for notice when an action is brought under another statute. Plaintiff having brought this action under 42 U.S.C. § 2000d et seq., as well.

11. Plaintiff also requests the review contemplated by citizen suit provision, APA, and the review contemplated by Title VI, and any other applicable statute.

12. The Court must enforce the effluent standard applicable to residential lot owners since to distinguish between owners of vacant wetland lots versus developed wetland lots represents an arbitrary discrimination that amounts to a constitutional denial of equal treatment, and a deliberate denial of a federal benefit.

**13. The statute of limitations is not a bar to this action, since the EPA has waived its right to rely on the statute of limitations, not withstanding the doctrines of estoppel, equitable tolling, fraudulent concealment and continuing violation also apply to all the defendants.**

14. Plaintiff seeks damages as provided by 33 U.S.C. § 1365(a)(2) in the phrase "amount in controversy," and in accordance with Title VI for plaintiffs compensatory damages, the intentional discrimination, and plaintiffs emotional distress, as provided by 33 U.S.C. § 1365(e).

**CLAIM NINE - Rockaway Township's Ordinance 54-lOOL Denied a Federal Benefit.**

1. Rockaway Township is a member of the RVRSA.

2. Rockaway agreed to comply with 40 CFR Ch. I, Subpart F, §30.600 (E, as a member of the RVRSA, in order to get the federal grant.

3. EPA's grant condition is a contract condition since it fails to present explicit federal statutory authority that Rockaway could act upon.

4. Rockaway passed ordinance §54-lOOL in support of the grant condition, which constitutes local action, since no federal authority was provided to support Rockaway's actions.

5. Rockaway's passage of ordinance §54-lOOL to deny wetland lot owners the right to connect to the sewer in support of EPA's grant condition represents a failure to perform the duty called for by 40 CFR Ch. I, Subpart F, §30.600 (E.

6. Rockaway Township violated a federal regulation that preempts its ordinance, thus proving Rockaway violated federal law.

7. By violating the regulation and Title VI, Rockaway Township violates NJSA 40A:48-2, thus exceeding the authority in an enabling statute, which renders its ordinance "void ab initio".

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**8. Passing an ordinance that denied plaintiff the right to connect to the sewer represents a breach of both; the duty created by regulation, and the duty to protect the public.**

9. Passing an ordinance that continues to affect plaintiffs

class to this date in violation of an enabling statute, Title VI regulation, and their duty, represents a continuing violation.

10. Rockaway's intentional discrimination of a policy Congress considers vital, amounts to a waiver of its affirmative defenses in accordance with federal law.

11. Rockaway's passage of this ordinance represents a violation of 42 U.S.C. 1983 since the town denied plaintiff equal treatment and property rights protected by the Constitution.

12. Plaintiff makes Rockaway Township a party in order to have this court declare the rights of the parties with respect to the ordinance passed in support of a contract condition that fails to provide explicit federal authority.

13. Rockaway Township knew this ordinance violated the law, so it took extraordinary steps to conceal that its actions were in support of local law.

**CLAIM TEN - Rockaway Township Illegally Charged an Assessment.**

1. Rockaway provided plaintiff with sewer connection slips to lead plaintiff to believe that he could connect to the sewer while concealing the ordinance that would prevent connection.

2. Rockaway sold plaintiff a lot it knew was affected by that ordinance.

3. Rockaway charged plaintiff an assessment though his lots did not appear in the ordinances applicable to the area where they are located.

4. State law provides for a refund of assessments when the benefit for which they were paid was not provided.

5. Rockaway's planning board approved plaintiffs minor subdivision to fraudulently conceal its illegal ordinance and assessment.

6. State regulations preclude septic system within 100' feet of a sewer line. The regulation and grant condition prevents development.

7. Upon plaintiffs application for building permits, Rockaway made it appear that the grant condition was recently imposed in order to conceal that said denial was based on ordinance.

8. Rockaway's acts in furtherance of the grant condition and it nonexistent assessment represent affirmative acts amounting to a

a waiver of its right to claim the protection of the statute of limitations, res judicata, and claim preclusion in accordance with federal law.

9. Plaintiffs N.J. freshwater wetlands exemption and Army Corp of Engineer's fill permit have long expired, thus preventing plaintiff from developing.

10. Plaintiff is entitled to damages for being denied the right to build at that time.

11. Plaintiff asks the court to declare plaintiffs rights on these issues

CLAIM ELEVEN - The Attorney General failed to perform their duty.

1. The Attorney General of these United States failed to perform his or her duty in accordance with E.O. 12250 by not recognizing that Regulations 40 CFR 35.925-8(b) and 35.925-13(e) are inadequate since they exceed EPA's statutory authority, in whole or in part. The failure of which creates an implied authority that does not exist.

2. The Attorney General failed to catch the fact that regulation 35.925-13(e) violates federal law, thus exceeding EPA's statutory authority.

**PAGE 8**

3. Attorney General's failure, has resulted in EPA claiming implied authority to impose its grant condition, thus making the Attorney General partially responsible for plaintiff and his class being denied their federal entitlement.

4. The Attorney General's sovereign immunity is waived in 33 U.S.C. § 1 365(a)(2) citizen's suit section of the CWA, since the Attorney General's failure to review the regulations in relation to standing federal law has contributed to EPA's violation of the Clean Water Act.

5. The Attorney General's conduct is subject to review under the APA since the Attorney General failure to perform her duty, has contributed to EPA's violation of law.

6. Plaintiff asks the Court to review this claim in accordance with the APA.

**CLAIM TWELVE** - Intentional Emotional Distress.

1. EPA, NJDEP and Rockaway has caused plaintiff severe intentional emotional distress by acting in violation of federal law in support of a grant condition that has denied plaintiff equal protection of the law, in order to prevent him from developing his lots.

2. Their deliberate violation amounts to an affirmative act that waives their right to affirmative defenses to prevent a judicial review.

3. Rockaway has contributed to plaintiffs severe emotional distress by passing a local ordinance to deny plaintiff a federal benefit contrary to a regulation that it was obligated to follow. This deliberate violation is outrageous since it constitutes a denial of equal protection. It requires plaintiff to bring an action against the EPA, NJDEP and Rockaway, in order to show that neither EPA or NJDEP has authority that Rockaway can rely on to jusflty its conduct.

4. EPA created a procedure for grant waivers that included Rockaway, RVRSA, NJDEP and finally the EPA. This procedure is illegal since EPA was violating federal law to impose its grant condition in the first place. This procedure was intended to cause intense emotional distress in each applicant for a waiver, as supported by the fact that the EPA negotiated denials of these waivers with the NJDEP. Therefore, this procedure was designed to deny the very waiver for which the procedure was created, proving deliberate intentional emotional distress.

5. The deliberate denial of due process evinced by EPA's conspiracy with NJDEP proves the procedure to vindicate plaintiffs rights was inadequate, to protect plaintiff from this conspiracy, thus denying plaintiff due process. This conspiracy being extreme and outrageous.

6. EPA's conspiracy continues to this date, proving plaintiff continues to be denied the right to connect, even if he were to file another waiver. Plaintiff class being denied all profitable use of their property while this conspiracy continues.

7. The conduct of EPA, NJDEP and Rockaway is of such a deliberate nature that plaintiff has suffered intense emotional distress in the form of anger, rage, frustration, severe headaches, and other symptoms that include, but is not limited to fear for his life for bringing this action, which has only added to plaintiffs

emotional distress.

8. Since EPA's conduct is outlined in a memo that was not available to plaintiff or his class, constitutes a fraudulent concealment of a due process and equal protection. This conspiracy tolls the statute of limitations. EPA and NJDEP's conduct on this point is so outrageous that it amounts to an affirmative waiver of every conceivable affirmative defense that could be raised to block a judicial review of this conduct.



**DEMANDS**

**DEMAND ONE**

Plaintiff asks the Court to review the foregoing claims in accordance with the statutes on declaratory judgment, APA review, the review contemplated by 42 U.S.C. 2000d et seq., and whatever review is called for by the citizens suit section of the Clean Water Act, as well as any other relief that is within the court's power to grant, beside the relief requested in the following demands.

Any alternative request for relief that the court is not able to grant that must be stricken should only affect the offensive relief without its affecting the relief remaining in that demand.

Each portion of a demand is severable from the rest, so if any is deemed offensive, then the offensive portion can be freely stricken by the Court, while the remaining portion survives.

**DEMAND TWO**

Plaintiff asks the court to exercise its powers of mandamus within the limits of its discretion as it applies to any violation.

Plaintiff asks the court to exercise its powers of mandamus within the limits of its discretion as it applies to the relief requested.

**DEMAND THREE**

Plaintiff asks the court to declare the rights of the parties

with respect to Rockaway Township's ordinance § 54-1 00L, since that ordinance represents local action that denies a federal benefit in violation of a federal regulation that preempts the ordinance.

Plaintiff also seeks a declaration of his rights with respect to the pendent claim of Rockaway charging an assessment for a lot that does not appear in the assessment ordinance, and his right to recover the assessment paid.

Plaintiff further asks the court to declare whether plaintiff is entitled to prejudgment interest on the assessment paid, since the assessment was part of a fraudulent concealment that would make it appear as though plaintiff would be able to connect, in order to have the statute of limitations run out.

**DEMAND FOUR**

Plaintiff prays the jury grant him an award of one million dollars or whatever amount the jury deems appropriate for Rockaway Township's intentional infliction of severe emotional distress caused by Rockaway's intentional denial of a federal right, its breach of duty to the public, its violation of 42 U.S.C. 1983 and 2000d et seq., and for deliberately concealing material facts from plaintiff over a prolonged period of time to run the statute of limitations.



**DEMAND FIVE**

Plaintiff prays the Court declare or render its findings with respect to EPA, NJDEP, Rockaway Township, and Attorney General failed to perform their duty, breach their duty, otherwise violate federal law, and the Constitution as it applies to each allegation, claim, and issue.

**DEMAND SIX**

Plaintiff prays the jury award him compensatory damages from either the EPA, Rockaway, or NJDEP, individually or

collectively in accordance with the respective percentage of culpability.

Plaintiff prays for the loss of profit from the sale of two houses that would have taken place in 1986, in the amount of Two Hundred and Sixty Thousand Dollars ($ 260,000.), plus the recovery of out of pocket costs of approximately forty five thousand dollars ($ 45,000). The percentage of liability to be determined by the jury, or court, if this is not a proper jury issue.

Plaintiff prays the jury award him prejudgment interest at the prevailing rate that is paid in this state or by the federal government, for each of the intervening years that plaintiff has been denied the use of the profit and his costs. This award to be paid by the parties in accordance with the disposition of liability in the preceding paragraphs.

**DEMAND SEVEN**

Plaintiff prays the jury award him compensatory damages for severe intense emotional distress in an amount the jury deems appropriate. The jury being asked to fix the percentage of liability for the EPA and NJDEP. If the jury is not entitled to set the percentage of liability, then plaintiff asks the court to set it.

**DEMAND EIGHT**

Since plaintiff is not entitled to bring a class action suit, plaintiff prays for extraordinary damages in the amount of twenty five million $25,000,000. dollars or whatever amount a jury deems appropriate. These moneys are to be put into an interest bearing trust fund that will be used to compensate individual lot owners for damages beyond the compensation for a taking as it applies to a grant condition that prevents sewer connection in any grant provided by the EPA. Compensation; for intense emotional distress will be limited to $ 5,000. and compensatory damages will also be limited to $5,000. as well. Every claim will be supported by a court order that reviewed the damages before the foregoing claims are paid. Plaintiff or the executor of his estate will review and approve each claim before it is paid. A reviewing fee of six percent will to be paid from the trust fund for that review.

Each owner seeking damages for EPA's taking is to be

advised of this trust and its terms in order that they may take full advantage of it. The fund will terminate ten year after it is begun with the remaining funds to revert to plaintiff or his estate.

**PAGE 11**

If this action is successful, it may foreclose the use of these waivers in future actions, thus denying other injured parties the opportunity to recover damages beyond that of a taking. Therefore, plaintiff asks for this award to heal his injury, and by realizing others affected by this condition need recognition of their injury in order to heal.

**DEMAND NINE**

Plaintiff asks the Court to allow him to further amend his complaint, after he retains an attorney, based on the outcome of the motions that will result from this complaint. If plaintiff is able to prove a prima facie case, then attorneys may be willing to handle this matter on a contingent fee arrangement. Since plaintiff cannot afford the estimated fees for dealing with this case, he is forced to handle the matter pro se.

**DEMAND TEN**

Plaintiff asks the jury for an award of punitive damages against the EPA, NJDEP, and Rockaway, either individually or collectively, in any amount it deems appropriate for defendant's intentional violations. If percentage of culpability is needed, then plaintiff asks the jury or the court to determine the percentage of culpability

**DEMAND ELEVEN**

Plaintiff prays the court award him legal fees for the attorney that will be used to deal with this matter after plaintiff makes a prima facie showing that he has been denied due process, equal treatment and for defendants violation of 42 USC 1983 and 2000d et seq. Plaintiffs request for attorney's fees is further supported by 42 USC 1988.

February 27, 1997

Nelson A. Fernandes

**EXHIBIT A TO COMPLAINT**

U.S.E.P.A.

DATE: APR 23, 1979

SUBJECT: Limited access interceptor sewers as they relate to the Construction Grant Program in New Jersey

FROM: Robert W. Hargrove, Soil Conservationist
NJ/PR Section, 2-WA-EI

TO: Daniel Sullivan, Chief
EIS Preparation Branch

THRU: Stephen Y. Arella, P.E., Chief
NJ/PR Section, 2-WA-EI

Limiting access to intercepting sewers is a complicated issue because of the broad latitude for varying legal Interpretations. If suitable controls could be implemented, it could be of great help to prevent Induced growth in environmentally sensitive areas.

This paper will deal with an overview of the situation. Court cases and New Jersey's State regulations and statutes will be explored. EPA options as they pertain to this subject will be explained. These options will be further illustrated by case studies In several EPA regions.

Sewage Disposal as a Public Service

The question of whether or not sewage disposal is a public service is an important consideration in determining the legality of limiting access. One important aspect is the source of funds. If, as in the past, the funds arise from local taxes, it is likely to be considered a public utility and limiting access would be difficult. However, since passage of the Clean Water Act, most of the design and construction of wastewater treatment facilities are financed by Federal grants. The remainder comes from state grants and bond issues which are recovered through user charges. Theoretically, facilities built using such financial backing could limit sewer hook-ups.

The issue of sewage disposal as a public service was also

addressed in the courts. In Cloyes vs. Delaware Township it was noted "Sewage disposal is not one of the public services anciently furnished by local governments, nor Is it uniformly so furnished today." This was further substantiated in Pleasure Bay Apartments vs. City of Long Branch, "Neither statutory nor case law impose; a mandatory duty on a municipality to furnish municipal service for disposal of garbage or other wastes:" These cases deal primarily with a municipality not being required to provide such service if none was provided in the first place.

New Jersey State Law

New Jersey's Sewerage Authority law enables counties or municipalities, either alone or in combinations, to establish a sewerage authority. Sewerage authorities are empowered to construct, operate and maintain facilities to collect, treat and dispose of sewage. The law specifies that these authorities have the power, "to enter into any and all contract, execute any and all instruments, and do and perform any and all acts or things necessary, convenient or desirable for the purpose of the sewerage authority or to carry out any power expressly given in this act."

The question of allowing hook-ups rests with both the authority and the municipalities. The authority is free to reasonably fix the terms and conditions oft service. The key word in this statement seems to be reasonably. A case from Arizona is a good example of this. In Travaini vs. Maricopa County the county concluded that the county "having installed and maintained a sewer line past the property in question, the city is thereafter required to allow any abutting property owner to use said sewer subject only to reasonable limitations." The "reasonable limitations" in this case being the capacity of the line.

The Arizona case deals with a collection system in a populated area, not an interceptor away from the population, and quite possibly in a sensitive environmental area.

It should be noted that in the case of Southern-Burlington County NAACP vs. Township of Mt. Laurel the courts have concluded that limited access interceptors can not be used as a means of exclusionary zoning.

New Jersey law states that sewerage authorities can be formed. The only stipulation concerning hook-ups is the abatement of pollution and related health hazards. Another consideration

stemming from EPA's cost effectiveness guidelines is that hook-ups may be necessary for a system to be economically feasible.

State law does give to the authority the ability to enter into contracts. These contracts are primarily with municipalities for sewage collection and disposal. It seems to imply that they can also enter into contracts with EPA through grant agreements. These contracts stand on the same footing as contracts between natural persons or municipalities.

**New Jersey Septic System Regulations**

**The Septic System Regulations of New Jersey also affect the issue. The state will not authorize the building of a septic system on a property If a sewer line is within 100 feet of it. With the exception of the general guidelines for sewer hook-ups, the sewerage authority determines sewer use.**

EPA Authority

Protection of environmentally sensitive. areas is mandated by Federal policy. Certain actions can be taken to promote this policy with respect to the Construction Grants Program. The first and easiest mechanism is. to limit the capacity of the system to exlude development in environmentally sensitive areas. This is an attempt to limit the number of hook-ups to the system to areas where growth will not impact critical areas.

There will be some small projects that can not be limited with respect to carrying capacity because of minimum Sizing of unit processes for treatment. Projects such as these might require grant conditions. The conditions will have to be met in order to insure receipt of a. 201 grant.

The subject of grant conditions was addressed in PRM 75-26 which dealt with mitigating secondary impacts in the Construction Grants Process. The Regional Administrator can withhold of Step and 3 grants until effects, or agrees to conditions in the grant document requiring actions to minimize the effects.

Some actions to mitigate these secondary effects include, but are not limited to: phasing and orderly extension of sewer service, project changes improved land use planning, and sewer use restrictions. It goes on to say that conditions on a grant must be reasonable and the applicant must demonstrate "good faith" and be moving toward mitigative action before the grant is awarded.

Actions that can be taken if the applicant refuses to abide by the grant agreement are: withhold payments, refuse to process subsequent grant applications from the municipality, refuse to approve grants for future phases of the projects, enter an injunction against the grant recipient, suspend project work or terminate the grant and recover unexpended EPA funds.

The new regulations (9/27/78) on Municipal Wastewater Treatment Works also contain provisions for conditions on grants. Section 35.935-16 on page 44073 states that "the Regional Administrator shall not pay more than 80% of the Federal-share of any Step 3 project unless he has approved the grantee's sewer use ordinance." This means 15% or more of the total project costs could be held if this is condition wasn't met. However, since this process now entails just a review of the ordinance for compliance with the regulation this may be of minimal value to us at this time.

Case Study Evaluation

Case studies from EPA regions show the various techniques that can be used to mitigate adverse impacts in the Construction Grants Program.

In 1975 a project from Region I on Block Island, Rhode Island could have encroached on environmentally sensitive areas. That region first scaled down the project. Then a grant condition was imposed to accept no new hook-ups from wetlands in accordance with the State law.

That same Year a project from Region III in Falling Creek, VA which involved the eutrophication of reservoirs and induced secondary effects on Swift Creek Reservoir. Plant size was reduced and the Step II grant was conditioned on the development of a Swift Creek Watershed Management Plan.

In 1975 a Region VIII project in Renner, SD was leading to new development on a floodplain. A grant condition, based on the county floodplain ordinance, that said no new hook-ups from the 100 year floodplain. The Region also recommended that capacity be limited to existing population plus a moderate increase.

In 1974 a Region IX project in Fairfield, CA included pressure to increase industrial and low density residential land on or near Suisun Marsh and pressure to develope agricultural land with ... pacts on air quality and wildlife. The Step 3 grant was conditioned to not provide service to new development

immediately adjacent to the marsh based on pending State protection legislation..

In 1976 a Region X project in North Fremont, SD was leading to pressures to increase development in environmentally sensitive areas. These areas included fishing and wildlife management areas. The project was altered to have four small sub area facilities instead of one large Regional plant with long interceptors. The Step 2 and 3 grants were conditional on County compliance with State law requiring development of growth controls and a comprehensive land use plan.

Summary

Case studies show that EPA can and does use grant conditions and project changes to limit development due to funded projects. It should be said that if it is possible to base the grant condition on a state or local law then do it. This will take a lot of heat for such an action away from falling directly on EPA. Those laws could include floodplain ordinances (Block Is., RI) or complying with State requirements for land controls (North Fremont,' SD). Such conditions could be based on Federal law but this tends to foster the public opinion that the Federal government is just trying to control 'local zoning. State or local laws that apply to such situations should be added in to direct the public rage away from EPA, when possible.

Limited access interceptors is a question that has never formally been answered in the courts. to do so might require upwards of 3-4 years to make it through all appeals. The 'question is not entirely addressed in New Jersey State law either. The policy of protecting sensitive environmental areas can be fostered by changing the plan or imposing grant conditions. EPA has done this in the past and an analysis t-f these cases show how such problems can be handled in the future.

Recommended Regional Policy Options

1) Grant Conditions with 3rd party enforcement after grant expiration.
2) 208 plan inclusion of model local sewer use ordinance and adoption by local municipalities.
3) Approval of Sewer Use Ordinances by EPA.
4) Constraining service. agreements between MUA's and member municipalities.

**EXHIBIT B TO COMPLAINT**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE MAY 2 5 1979

SUBJECT Grant and Permit Conditions to Restrict Sewer Hookups in Environmentally Critical Areas

FROM Daniel Sullivan, Chief
EIS Preparation Branch

TO Conrad Simon, Director
Water Division

## Scope of the Problem

EPA's funding of wastewater treatment works through the Construction Grants Program has been criticized for not adequately discouraging growth in environmentally sensitive lands (i.e. floodplains, wetlands, and significant wildlife habitats). In the past, the Agency's policy has been to eliminate any capacity in proposed systems that would serve these sensitive lands. However, in several cases this mitigating measure has proven to be inadequate to curb unsound growth.

## Issue

Should EPA-Region ii begin to affix special conditions to Step 2 and 3 construction grants, 208 areawide plans, and 402 permits to prohibit development in environmentally critical areas?

## Salient Factors

The September 27, 1978 Construction Grants Program Rules and Regulations specifically encourages the use of grant conditions restricting sewer hookups to protect environmentally sensitive land from new development. However, because some of the legal complexities associated with such grant conditions, Region II has

never exercised this control. We now have several Ideal examples where such conditions are both appropriate and easily justified.

Unfortunately, merely limiting the size of wastewater treatment facilities does not adequately protect sensitive areas. An excellent example of how a reduction in facilities capacity has a very limited influence on where housing and sewer hookups can occur Is the proposed Cape May Region project. The EPA had reduced the size of the proposed facilities to specifically exclude wetlands, flood hazard areas, and significant wildlife habitat areas from development. Yet, an application for a 250 unit residential development (in the flood hazard area - see attached Map 1) is currently before the New Jersey Department of Environmental Protection. Discussions with DEP personnel reveal that the developer intends to rely on the proposed regional- sewer system to satisfy the wastewater treatment need of the proposed housing project.



Major Actors

1. USEPA-Region II (RA, WDD, RC)
2. U.S. Fish and Wildlife Service
3. New Jersey Department of Environmental Protection
4. Loc-al Municipalities
5. 208 Agencies
6. Natural Resources Defense Council
7. American Littoral Society
8. Na;tional Wildlife Federation

Political Considerations

Grant conditions of this type have been used in other regions but have relied heavily upon State Law for their enforcement (see Attachment 1).New Jersey State Law does not adequately protect environmentally sensitive areas primarily because federal regulations encompass more types of sensitive areas. However, there are strong statements in the New Jersey Water Pollution Control Act (NJWPCA) Regulations which mandate conformance

of future 201 grants with applicable 201, 208 and 303 plans.

EPA has a clear mandate in law, regulation, executive orders and EPA Policy (see Attachment 2) to protect the following critical areas:

1. Significant Habitats of Wildlife, including Rare and Endangered Species Habitats - Endangered Species Act and Fish and Wildlife Coordination Act
2. Floodplains - Executive Order 11988
3. Wetlands - Executive Order 11990

We also have some rather strict policies on protection of prime agricultural lands (EPA Policy Statement - September 26, 1978) and less strict policies on other sensitive areas, such as steep slope areas and unique vegetational communities.

There- are a number of Influential national interest groups that have been actively prodding EPA to apply such conditions. Among these are:

1. Natural -Resources Defense Council
2. American Littoral Society
3. National Wildlife Federation

In addition, the U.S. Fish and Wildlife Service has also expressed their opinion that grant conditions of this type should be used to protect the unique ecological nature of the Cape May Region.



Background

EPA-Region II has been reticent in applying such conditions in the past for several reasons. Most New Jersey facility planning grants are given to Municipal Utility Auth. (MUAs) established through State Law. Some questions have been raised as to whether or not an MUA can accept • condition which affects land use controls and, If they can, whether the condition is enforceable against its member municipalities The NJSA 40:14A-23 (see

Attachment 3) appears to permit the MUA to accept such conditions. Another frequent objection to the use of the grant conditions has been that the duration of the enforcement of a grant condition expires at the end of the grant period. However, since many of our grants are phased, the applicability may well be extended for considerably longer period than the Initial grant.

Admittedly, limiting access to interceptors or collection Systems via grant conditions themselves will not guarantee better land use planning. However, it is an essential element of a multi-pronged approach to resolving this problem.

The NPDES Proposed Revision of Existing Regulation published in the August 21, 1978 Federal Register requires discharge permits to be consistent with the reflective of the Clean Water Act and any appropriate Federal Executive Orders. It also states that permits should include more stringent requirements where necessary to insure consistency with areawide waste treatment management (208) plans (AW'TMP). Many existing permits are expiring in the near future and, prior to reissuance, considerable effort is anticipated to assure consistency with both 201 facilities plans and 208-funded AWTMP's

Recommendations

Based on the May 24 briefing on the Cape May regional project, the following represents my understanding of the direction set by Eckardt C. Beck. The activities proposed can and should be initiated concurrently and are not necessarily contingent upon the success of the other parts for their effectiveness.

First, where the review of 201 facility plans (including EASs) identifies environmentally sensitive areas requiring protection, grant conditions should be affixed specifically constraining sewer hookups. We anticipate that detailed maps of the facility planning area will be used to identify sensitive areas and existing discharges (I.e. homes and subdivisions) There are two New Jersey 201s In-house that are excellent examples of the need for such conditions: Jakes's Branch Interceptor and Stafford Township Collection System.

The proposed Cape May Region Wastewater Treatment Facilities Plan requires a slightly different approach. A negative declaration was issued on January 25, 1979. The use of a special conditlon restricting sewer hookups represents a substantial change from the statements made in the negative declaration. Once the facility plan is revised to show which specific lots will Le served by the proposed facility, we will issue an addendum to the negative declaration specifically detailinq our intent to use grant conditions. The addendum will allow far a 30 calendar day comment period.

Second, the 208-funded areawide waste treatment management plans (AWTMP) for these areas should be required to reflect the need to protect these sensitive areas. In order to accomplish this in the Cape May Region, the 208 agency should adopt the revised 201- plan as part of the AWTMP. No Step 3 grant will be awarded to the CMCMUA until this portion of the AWTMP is approved by EPA. We intend to send a letter to the Cape May 208 agency informing them of this requirement.

Third, the Permits Branch, In coordination with Regional Council, should develop permit conditions to reflect sewer hookup restriction which are detailed in the special grant condition for the Step 2 201 grants. Permits 8ranch should also develop a strategy for indentifying future permit violations, e.g., if a connection occurs from an area defined to be environmentally sensitive.

**Pros and Cons**

Pros: Use of grant conditions and subsequent enforcement will clearly demonstrate EPA's intent to protect environmentally sensitive areas. Even if we had to rely on third party enforcement of the conditions, it would provide a firm legal basis for future adjudication.

It is responsive to valid concerns presented by NROC, ALS, NWF, and USFWS. Failure to respond to their inquires is likely to result in litigation on at least on in-house project (Cape May Region).

Once established, the use of grant conditions will streamline the 201grants process. - Projects are frequently delayed because of concerns that sensitive areas have not been adequately protected

(e.g. Cape May Region).

Projects which may prove more cost effective on a regional rather than subregional basis may no longer be channeled away from single plant schemes solely to protect environmentally sensitive areas.

Cons: Grant conditions of this type have never been used In Region II before and there is a potential for litigation concerning the legality of federal intervention in local land use planning.



These conditions may not be enforceable by EPA beyond the life of the current grant. However, in many cases, we anticipate future grants to the affected MUAs. Furthermore, a grant condition may be enforceable after the grant expires because it is a contract between EPA and the authority.

State acceptance of these conditions is complicated by the fact that they define sensitive areas differently than EPA defines them. Application of this process to other 201s, 208s and permits in the region is a manpower intensive effort.

**Strategy and Timetable**

1. Affix grant conditions to the two pending New Jersey 201 grants mentioned earlier, immediately.

2. Require the CMCMUA to revise the Cape May Region facility plan.

3. Issue an addendum to the Cape May Region Negative Declaration.

4. Require the 208 agency to work with the CMCMUA to assure adoption of the revised 201 plan prior to October 1, 1979.

5. Negotiate with the State to require them to amend its regulations to redefine environmentally sensitive areas

to agree with the federal definitions through the State/EPA Agreement process.

6. **Negotiate with the State to require them to amend its review procedure to reject grant applications and deny sewer extension permits which would serve sensitive areas through the 205(g) Delegation Agreement.**

7. Require all 208 grantees to give high priority to the identification of environmentally sensitive areas where largescale development is projected.

Additional Attachments

1. Basis in Regulation, Executive Order and EPA Policy Supporting the Use of Grant Conditions to Protect Environmentally Critical Areas.

2. April 23, 1979 memo from R. Hargrove to D. Sullivan discussing potential use of grant conditions to limit access to interceptors.

3. Article excerpted from New Jersey Effluents (April 1979) entitled "Limited Access Interceptors?"

cc: Peter Devine
William Muszynski
Helen Fenske
Pat Harvey
Charles Durfor
Dave Luoma
Richard Salkie
Mike Bonchonsky
Kevin Bricke
Steve Arella

**EXHIBIT C TO COMPLAINT**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON. D.C. 20460

July 11, 1980

**MEMORANDUM**

SUBJECT: Region II Policy on Protection of Floodplains and Wetlands Wetlands
FROM: Eckardt C. Beck, Assistant Administrator
For Water and Waste Management (WH-556)
To: Charles S. Warren, Regional Administrator
Region II

This office has reviewed Region II's Policy on Protection of floodplains and Wetlands and finds it to be a consistent application of national EPA policy.

As is aptly stated in the Regional policy, President Carter has called for the preservation and restoration of our Nation's floodplains and wetlands. In order to accomplish this goal, no Federal agency should encourage, in any way, the development of a floodplain or wetland.

Nationally, EPA has implemented this policy by stating that unless there is no "practicable alternative," floodplain or wetland development should not be encouraged either directly or indirectly. Statement of Procedures on Floodplain Management and Wetlands Protection, 44 FR 1455 (January 5, 1979).

More specifically, the construction grants program regulations provide detailed guidance for dealing with environmentally sensitive areas, including floodplains and wetlands. The regulations regarding funding of both collectors and interceptors are unequivocal in their support for preservation of these sensitive areas. See 40 CFR Sec. 35.925-l3(e) (collectors); 40 CFR Part .35, Appendix A, Sec. 8(f)(l) (Interceptors). Both of these sections also establish the propriety of using appropriate and effective grant conditions (e.g. restricting sewer hoohups) . . . to

protect environmentally sensitive areas ... from new development

Additionally, the Agency has a long-standing policy requiring the delination and mitigation of secondary environmental effects, including changes in population and economic growth and land use." PRM 75-26, consideratlon of Secondary Environmental Effects in the Construction Grants Process.

Your Regional policy provides for a general prohibition of sewer hookups on undeveloped portions of floodplains and wetlands. In certain, well-defined circumstances, exemptions may be granted by the Regional.Administrator. Enforcement is provided by using grant conditions which are enforceable by private parties for the life of the treatment works. Finally, these conditions may not be imposed until a full public hearing is conducted.

Each of these criteria -- and the policy as a whole-- is consistent with existing Agency policy. That policy permits and encourages the use of grant conditions to limit sewer hookups in environmentally sensitive areas. The public hearing requirement and the provisions for exemptions are ways of limiting the harshness of the policy and minimizing the burden on the public. Those policies are wholly consistent with the overall duties of minimizing the harm to the environment and providing service for the public. It may also be noted that the mapping requirements set forth in the Regional policy do not impose an excessive burden on grantees, since they must presently prepare the same lot-by-lot maps for tax assessment purposes.

Having thoroughly reviewed the Region II policy, I commend you for developing a policy to meet your Regional needs that, at the same time, are consistent with national policy.

**EXHIBIT D TO COMPLAINT**
State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

TRENTON
Division of Coastal Resources

Please address reply to
CN401
Trenton, N.J. O8625-0401

October 21, 1988
Mr. Nelson Fernandes
26 Watts Avenue
Denville, N.J. 07834

Re: **Freshwater Wetlands Exemption Letter**
Nelson Fernandes
BFW File No. 1435-880572.1-EX
Rockaway Township; Morris County Block 20504; Lot 8
Rockaway watershed; Passaic River drainage basin

Dear Mr. Fernandes:

This acknowledges receipt of your exemption request and the issuance by the 11. 5. Department of the Army, Corps of Engineers of a Nationwide Permit conditional approval file #87-0314-J3 and dated September 17, 3987, for the subject property. The federal conditional approval required that a jurisdiction determination (verification of the extent and location of wetlands and waters in relation to the Project activity) be performed by the New Jersey Department of Environmental Protection, Bureau of Freshwater Wetlands.

Based upon the information received, the wetlands affected by the Corps approved activity were found to be consistent with those shown on the plan submitted for approval under Nationwide Permit #26. In accordance with an agreement between thee New Jersey Department of Environmental Protection and the U.S. Army Corps of Engineers Philadelphia and New York Districts, the

the above referenced plan accurately identifies only the extent of State and Federally regulated waters and wetlands to be effected by the proposed activity under the Corps' Nationwide permit. **Therefore, the activities referenced in the ACOE approval letter are exempt from the requirement of obtaining a NJDEP Freshwater Wetlands Permit pursuant to N.J.A.C. 7:7A-2.7(g).** This exemption however, is subject to the following limitations:

1. This exemption does not obviate the need for any permits, approvals, or certifications required by any other Federal, State, county, or municipal review agencies with jurisdiction over this project. The exemption applies only to the requirements of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 et seq. and the rules adopted pursuant to that Act, N.J.A.C. 7:7A et seq.

2. If any discharge of dredged or fill material covered by this exemption letter contains any toxic pollutant listed under section 307 of the Federal Clean Water Act, this exemption shall be void and such discharge shall be subject to all applicable State and Federal toxic effluent standards or prohibitions, and shall require a NJDEP Freshwater Wet lands Permit.

3. This exemption shall remain in effect for that period time for which the above mentioned Corps approval letter is effective. Also, the U. S. Army Corps of Engineers retains the right to modify the Federal jurisdiction determination at any time, should the site conditions change.

4. The U.S. Army Corps of Engineers has permitted you to disturb 0.3 of an acre of freshwater wetlands and waters. Any additional disturbance to freshwater wetlands or waters on or adjacent to the properties referenced in this letter will be a violation of the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.).

   This exemption applies only to those activities for which authorization was specifically requested from the ACOE. This exemption does not approve or verify any other wetlands

delineation which may have been prepared for the site. This exemption only applies to those wetlands/water encroachments that are depicted on the plan titled Minor Subdivision, dated March 18, 1987. 1£ you wish to have the whole wetlands 1ine on the site verified, then you must request a NJDEP Letter of Interpretation.

The Act provides for penalties of up to $10,000 per violation, per day for violations of the Act, in addition to requiring removal of any illegal structures, fill, etc. and waters as provided under N.J.A.C. 7:7A.

5. If the information on which this exemption is based is found to be Inaccurate, or if the Corps' approval is terminated or revoked for any reason] the department reserves the right to void this exemption.

If you have any further questions regarding this exemption please contact Molly Gurien at (609) 984-0853.

Sincerely,

Robert Piel Jr., Chief
Bureau of Freshwater Wetlands

cc: U.S. Army Corps of Engineers: New York District
Rockaway Township Municipal Clerk
Rockaway Township Construction Official
Morris County Planning Board
Susan Pleibel, NJDEP Bureau of Program Development and Technical Services

**EXHIBIT E TO COMPLAINT**

State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
DIVISION OF WATER RESOURCES
CNO29
Trenton, N.J.08625-0029
George G. McCann. P.E.
*Director*

April 1, 1989

William P. Lawler, P.E., Chief
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

Dear Mr. Lawler:

Subject: Rockaway Valley Regional Sewerage Authority
Waiver Request - Additional Information
Rockaway Township - Block 20504, lots 8 and 9
Project No. C340389-04

A site inspection was performed on March 15, 1989 for the aforementioned property as per your request. This letter was prepared in order to notify your office of the findings of said investigation.

It appears that the wetland delineation on the property is appropriate. With the exception of the steeply sloping portions of the lots, which parallel the roads, the entirety of the property is wetlands. Additionally, several small streams run through the property to the adjacent drainage easement. This drainage easement runs into White Meadow Lake.

The surrounding lots are all developed with the exception of lot 7, which is immediately adjacent. The 100 to 150 feet closest to the road of each lot is cleared and developed. The lots are 275-419 feet deep, therefore, approximately 125-269 feet behind each home has

has been left in a natural state. The attached map (Attachment 1) shows the approximate extent of the natural area, which remains surrounding the drainage easement. Review of detailed ESA mapping from Rockaway Township shows a smaller extent compared to the field verification but a similar wetland configuration (included as Attachment 2). Through this, the lots are shown to be a part of a larger wetland.

**As a result of this investigation, I would like to reconfirm the previous recommendation to deny the request for a waiver from the grant condition for this property.**

In addition, an informational letter has been received from the owner as a supplement to the waiver request. This letter is enclosed for your review.

If you have any questions or problems concerning this matter, please contact Gabrielle Fay at (609) 633-1170.

Very truly yours,

Barbara Hirst, Chief
Technical Services Section
Municipal Wastewater Assistance Element

GF:BH:dc

Enclosures

**EXHIBIT F TO COMPLAINT**
MAY 5 1989

Mr. William H. Francisco, Jr.
Executive Director
Rockaway Valley Regional Sewerage Authority
99 Green Bank Road, R.D. 1
Boonton, New Jersey 07005

Dear Mr. Francisco:

This is in response to the Rockaway Valley Regional Sewerage Authority's (RVRSA) request for a waiver from the special grant condition that (Grant No. C-34-389-04) prohibits sewer connections from new structures in environmentally sensitive areas (ESAs). The request is on behalf of Nelson and Joan Fernandes, the owners of Block 20504 (formerly Block 34), Lot 8, a 18,900 sq. ft. undeveloped parcel located in the Township of Rockaway, Morris County, New Jersey.

As you are aware, the intent of the special grant condition is to protect ESAs (in this case wetlands) from: Sewer-induced development. When reviewing requests for waivers from the grant condition, we consider various factors such as the quality of the wetlands, the size of the property, and the extent of existing development surrounding the property, on a case-by-case basis

We have carefully evaluated all the information accompanying the request, as well as the analysis provided by the New Jersey Department of Environmental Protection (NJDEP) in its recommendation for denial of this waiver. Our review of the information provided to this office by the NJDEP indicates that the property contains approximately 10,800 sq. ft. of palustrine forested wetlands. These wetlands are part of a larger undeveloped contiguous wetland system delineated by the U. S. Fish and Wildlife Service. According to the applicant, these wetlands would be filled in to accommodate a proposed single family hone, and an associated rear yard to comply with current zoning regulations.

After consideration of the above, we must deny the request for a waiver from the grant condition because of the ecological value

and extent of the wetlands that would be adversely impacted if this property were to be developed as presently proposed.2

If there are any questions regarding this decision, please contact Mr. Robert Hargrove, Chief, Environmental Impacts Branch, at (212) 264-1892.

Sincerely,

"s/William J. Muszynski, P.E.

Acting Regional Administrator

cc: Commissioner C. Dagett, NJDEP
B. Hirst, NJDEP-CGA
D. Nelson, Upper Rockaway River Watershed Assoc.
N. & J. Fernandes

bcc: M. Delvicario, 2WM-MWP
J. Mello, 2WM-NJMP